Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

ARKANSAS TERM LIMITS, FRANK GILBERT, AND SPENCER G. PLUMLEY,

Petitioners,

v.

EUGENIA T. DONOVAN,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Arkansas

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PETITION FOR A WRIT OF CERTIORARI

A.J. KELLY
THE KELLY LAW FIRM
P.O. Box 251570
Little Rock, AR 72225
501-664-9461

EMMET T. FLOOD*
MICHAEL R. POMPEO
WILLIAMS & CONNOLLY
725 Twelfth Street NW
Washington, DC 20005
202-434-5000

STEPHEN J. SAFRANEK
University of Detroit-
Mercy Law School
651 E. Jefferson St.
Detroit, MI 48226
313-596-0268

**Counsel of Record*

Attorneys for Petitioners

We PP

QUESTION PRESENTED

Whether, consistent with Article V of the United States Constitution, the people of a state may issue nonbinding instructions to their state legislators and federal legislative delegation directing them to use the powers of their offices to support a term-limits amendment to the United States Constitution, and whether the people may place on the ballot information about the absence of such support.

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings in the Supreme Court of Arkansas were:

Eugenia T. Donovan, plaintiff;

Sharon Priest, Secretary of State of Arkansas, defendant;

Arkansas Term Limits, Frank Gilbert, and Spencer G. Plumley, intervenors.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Arkansas Term Limits, Frank Gilbert and Spencer G. Plumley respectfully petition for a writ of certiorari to review the decision and judgment entered on October 21, 1996, and the mandate issued on October 28, 1996 by the Supreme Court of Arkansas. Pursuant to Emergency Application No. A-310 filed by petitioners on October 29, 1996, that mandate was stayed by this Court on November 2, 1996. App. 1a.

OPINIONS AND ORDERS BELOW

The opinion of the Supreme Court of Arkansas in the original action below is reported at 931 S.W.2d 119 (Ark. 1996). A copy of the slip opinion is reproduced in the Appendix at 2a. This Court's November 2 Order granting a stay is reported at 117 S. Ct. 380 (1996), and a copy is reproduced in the Appendix at 1a.

JURISDICTION OF THIS COURT

The judgment of the Supreme Court of Arkansas was entered on October 21, 1996. This Court has jurisdiction to review that judgment pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

Article V of the United States Constitution provides in relevant part that:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress . . . .

STATEMENT OF THE CASE

This case presents the question of the constitutionality of Arkansas' constitutional Amendment 9. That amendment instructs Arkansas legislators, state and federal, to use the powers of their offices to support a term-limits amendment to the United States Constitution. It also requires the Secretary of State of Arkansas to place a statement on the next election ballot informing voters whether the candidate has failed to take specific action supporting a federal term-limits amendment.

A. The Parties

Petitioner Arkansas Term Limits ("Term Limits") is the unincorporated sponsor of proposed Amendment 9 to the Arkansas Constitution voted upon in the November 5, 1996 general election. Petitioner Frank Gilbert is Executive Director of Term Limits, a citizen of Arkansas and a registered voter; petitioner Spencer G. Plumley is Chairman of Term Limits and a citizen of Arkansas. Petitioners were intervenors in the Arkansas Supreme Court proceeding below.[1] Respondent Eugenia T. Donovan is a citizen, resident, taxpayer, and registered voter and was the complainant below. App. 2a. The respondent in the original action below was Arkansas Secretary of State Sharon Priest.

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[1] *See Donovan v. Priest*, No. 96-1120, 931 S.W.2d 119 (Ark. 1996) (original action) (App. 2a).

B. Amendment 9

In relevant part[2] Amendment 9 states that:

(1) the official position of the State of Arkansas is that all its elected officials should vote to enact term limits for members of the U.S. Congress (section (d));

(2) the will of the Arkansas people is that no person should be a member of the U.S. House of Representatives for more than three terms and no person a member of the U.S. Senate for more than two terms (section (e));

(3) each member of Arkansas' U.S. Congressional delegation is "instructed to use all of the powers of the Congressional office to pass" a Congressional Term Limits Amendment (section (g));

(4) each member of the Arkansas legislature is "instructed to use all powers delegated to each legislator to pass [an] Article V application to the United States Congress" (section (*l*)) calling for a convention to propose amendments to the U.S. Constitution to establish term limits for the U.S. Congress (section (k));

(5) in the case of incumbent legislators running again for office, upon future primary, general and special election ballots for U.S. Representative or Senator (section (h)) or Arkansas state representative or senator (section (m)) there shall be printed adjacent to the name of any legislator failing to take designated legislative action in support of a term

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[2] The full text of Amendment 9 is attached at App. 25a.

limits amendment[3] the following informational provision: "DISREGARDED VOTER INSTRUCTION ON TERM LIMITS" (section (i));

(6) that in the case of non-incumbent candidates filing to run for state and federal legislative office, they shall be permitted to sign a term limits pledge[4] and any candidate declining to sign such a pledge shall have the informational provision "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" printed adjacent to that candidate's name on the ballot (section (j));[5]

(7) the Secretary of State shall determine whether the informational phrases shall appear on the ballot and shall be responsible for certifying the appropriate indication to county clerks and election officials (section (n)).

C. Procedural History

On September 4, 1996, the Arkansas Secretary of State certified Amendment 9 for the November 5, 1996

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[3] Actions constituting failure to support a term limits amendment are set forth in detail in sections (h)(1)-(8) (U.S. Congressional delegation) (App. 29a-30a) and (m)(1)(a)-(*l*) (Arkansas state legislature) (App. 31a-33a).

[4] That pledge reads in relevant part: "I support Congressional term limits and pledge to use all of my powers to enact the proposed Congressional Term Limits Amendment set forth [above]." Section (j)(3). (App. 30a-31a).

[5] Complainant Donovan did not challenge the nonincumbent pledge. Nor did the court below discuss this provision. Notwithstanding Amendment 9's severability clause, *see* section (r) (App. 37a), the Arkansas court struck Amendment 9 *in toto*, including the nonincumbent pledge provision.

general election ballot. On September 20, 1996, respondent Donovan filed a complaint in the form of an original action before the Arkansas Supreme Court challenging Amendment 9 as violative of Article V of the United States Constitution. On October 21, 1996, the Supreme Court of Arkansas held that Amendment 9 subjected Arkansas' legislators to "threatened potential political death[]" and thereby bound legislators "in an extortive manner" inconsistent with the two exclusive avenues of constitutional amendment set forth in Article V. App. 23a. It then struck down Amendment 9, concluding that "proposed Amendment 9 is clearly violative of the provision in Article V of the United States Constitution [as] an indirect attempt to propose an amendment to the United States Constitution and as such violates the narrow, specific grants of authority provided in Article V." App. 23a.[6]

D. This Court's Prior Order

Petitioners then filed an Emergency Application for Stay Pending Review on Certiorari with Justice Thomas in

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[6] The Arkansas court's decision rested on federal constitutional grounds and no independent and adequate state ground is present. *See Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983). The Arkansas court stated that "[t]he proposed Amendment 9 is clearly violative of the provision in Article V of the United States Constitution that all proposals or amendments to that Constitution must come either from Congress or state legislatures — not from the people." App. 23a. Moreover, the opinion's conclusion that proposed Amendment 9 exceeds the scope of the powers reserved to the people in Amendment 7 of the Arkansas Constitution is a direct result of the fact that the Arkansas court "felt compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did." *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977).

this Court.[7] Justice Thomas referred the Application to the full Court. On November 2, 1996, this Court (by a 7-2 vote) granted a stay of the decision and mandate below.[8] App. 1a.

The election on Amendment 9 was held on November 5, 1996. Arkansas voters approved Amendment 9 by 61-39% margin.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari in this case because the decision below raises a fundamental question of federal constitutional law not yet answered by this Court; because the decision below erroneously interprets Article V of the United States Constitution to deprive the citizens of Arkansas of their right to instruct their elected (and would-be) representatives on their views concerning U.S. Congressional term limits; because the decision below creates a split of

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[7] The State of Arkansas also filed an Emergency Application to this Court seeking a stay of the Supreme Court of Arkansas' decision. In that Application (A-320), the State adopted the arguments of the present petitioners in their entirety. That Application was also granted by this Court in its November 2 Order. App. 1a.

[8] *Arkansas Term Limits v. Donovan*, 117 S. Ct. 380 (1996) (A-310) (order granting stay). In granting the stay, seven members of this Court implicitly found that petitioners had made an extraordinarily strong showing that relief through writ of certiorari was appropriate in this Court. To obtain the stay, petitioners were required to establish (1) a likelihood of irreparable injury that, assuming the correctness of the applicants' position, would result were a stay not issued; (2) a reasonable probability that the Court will grant certiorari; and (3) a fair prospect that the applicant will ultimately prevail on the merits. *See Planned Parenthood of Southeastern Pennsylvania v. Casey*, 114 S. Ct. 909, 910 (1994) (Souter, J., as Circuit Justice).

authority with the highest courts of three other states on the instruction issue; and because the decision below is at odds with well-established practices of using the ballot to present nonbinding instructions to a state's legislators and to inform voters as to the views and actions of their legislators.

I. THE ARKANSAS SUPREME COURT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THE SUPREME COURT.

Term limits for members of the United States Congress is an issue of fundamental constitutional importance and of continuing concern to petitioners and millions of other Americans. Two terms ago this Court decided that states could not limit the terms of their own U.S. Congressional Representatives in the House and the Senate. *U.S. Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842 (1995). This Court said "[a]ny such change [adopting term limits on congressional service] must come . . . through the Amendment procedures set forth in Article V." *Id.* at 1871.

In response to that decision, the citizens of Arkansas sought a mechanism for making known to their elected representatives their wish to have the U.S. Constitution amended through one or the other of the procedures established in Article V. The people of Arkansas seek the opportunity to be represented by persons willing to support a term-limits amendment to be implemented through the mechanisms of Article V. In order to achieve that goal, Arkansas citizens also seek to be informed as to their representatives' views and voting records relating to a federal term-limits amendment. As this Court said in *Thornton*, it is a "'fundamental principle of our

representative democracy' embodied in the Constitution, that 'the people should choose whom they please to govern them.'" 115 S. Ct. at 1845 (quoting *Powell v. McCormack*, 395 U.S. 486, 547 (1969)).

If the decision and mandate of the Supreme Court of Arkansas are allowed to stand, the November 5, 1996 election on Amendment 9 will have been invalid and the citizens of Arkansas will be prevented (1) from exercising their historic right to instruct their legislators and (2) from being informed about their representatives' voting records on a term-limits amendment. Contrary to the decision of the Arkansas court, Article V simply does not require this result.

The court below acted under what it perceived to be the mandate of this Court in *Hawke v. Smith*, 253 U.S. 221 (1920). Applying that case, the Supreme Court of Arkansas somehow used Article V of the United States Constitution to convert the quotidian lot of the elected representative — the possibility that the voters will turn him out on election day — into a federal constitutional violation. Its decision lacks support in either constitutional text, structure or history, or indeed in any applicable precedent of this Court. When such an interpretation of the U.S. Constitution does so much harm to such fundamental rights, it should not be allowed to stand.

Hawke[9] is entirely inapposite here. It held only that the Article V power to ratify a proposed amendment to the U.S. Constitution could not be exercised directly by the people of a state. 253 U.S. at 227. *Hawke* provides no support for the Supreme Court of Arkansas' conclusion that Article V of the United States Constitution prohibits citizens

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[9] The Arkansas court also cited *Leser v. Garnett*, 258 U.S. 130 (1922), in support of its decision, but *Leser* simply reaffirmed *Hawke*.

from approving nonbinding pro-term-limits-amendment communications to their elected representatives merely because such communications are accompanied by the "threat[]" of "potential political death[]" created by informing voters of how their candidates voted or intend to vote on these issues. App. 23a. Indeed, the nonbinding character of Amendment 9 makes "reliance [on] . . . *Hawke* . . . obviously misplaced." *Kimble v. Swackhamer*, 439 U.S. 1385, 1387 (1978) (Rehnquist, J., as Circuit Justice).

Amendment 9 does not authorize the people of Arkansas to exercise any federal amendment powers. Arkansas legislators, state and federal, remain free to support a term-limits amendment or not and to vote their consciences on any term-limits-related issue. The only hazard they face is the prospect of defeat in a subsequent election. The Arkansas Supreme Court erred in finding this prospect of electoral defeat a form of illicit coercion inconsistent with Article V. Its erroneous application of *Hawke* has placed a strained and unsupportable construction on Article V — a construction directly infringing the rights of the people and State of Arkansas.

Moreover, if the decision below stands, the Arkansas court will not only have voided the substantive provisions of Amendment 9, it will also have used Article V to nullify the people of Arkansas' actual vote on the issue.[10] This Court has repeatedly said the right to vote is "a fundamental political right, because preservative of all rights," *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886), and that "[o]ther

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[10] As the court below put it: "[T]he pertinent issue . . . is . . . whether the measure's proponents are entitled to invoke the direct legislation process at all." App. 7a (quotation and citation omitted). The court said that they were not so entitled.

rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). The Arkansas court's decision has destroyed that right as well.

Furthermore, the Arkansas decision not only dooms Arkansas term-limits supporters' efforts, but it also chills the efforts of term-limits supporters in other states to communicate to their own legislators their wish that those legislators should take the steps set out in Article V's two routes to constitutional amendment. Given the time, effort and expense of mounting state-based initiatives of the type at issue here, the decision below, in addition to being erroneous on its face, is likely to have significant adverse consequences for the national citizenry. The decision has sufficiently wide-ranging effects to merit correction by this Court.

In sum, the decision below is without support in the Constitution or case law. It destroys the right of the people of Arkansas to vote on a duly certified ballot initiative; the right of the people to instruct their representatives on a political issue of the highest importance; and the right of the people to inform themselves as to the results of those nonbinding instructions. It accomplishes all of this through misapplication of a single case of this Court and by redefining the word "binding" to include the mere "threat" of "potential political death."

This Court's particular vigilance is needed to keep such an unjustified and unjustifiable reading of the U.S. Constitution from destroying fundamental rights of a state and its citizens. Article V poses no barrier to a nonbinding instruction-cum-ballot-informational-provision concerning a term-limits amendment. Petitioners therefore ask this Court

to set the record straight on this basic, and heretofore unanswered, question of federal constitutional law.

II. THE DECISION BELOW CREATES A CLEAR SPLIT OF AUTHORITY WITH OTHER STATE COURTS OF LAST RESORT.

Petitioners respectfully submit that the issue presented here is of sufficient gravity to merit this Court's attention even in the absence of a split of authority. But the Arkansas court's decision also creates a direct conflict with decisions of other state courts of last resort.

In *Kimble v. Swackhamer*, 584 P.2d 161 (Nev. 1978), *application for stay denied*, 439 U.S. 1385 (1978), the Supreme Court of Nevada considered the constitutionality of a statute submitting to voters a nonbinding referendum on the question of ratification of the Equal Rights Amendment. The measure allowed Nevada voters to recommend to legislators that they ratify the ERA. Like Amendment 9 here, the measure did not place any legal requirement on the legislature or legislators. Like Amendment 9 here, the Nevada measure directed the Secretary of State to certify the results of the vote for consideration by the legislature. And as in this case, the provisions at stake were such that "the legislature [could] vote for or against ratification, or refrain from voting on ratification at all, without regard to the advisory vote." *Id.* at 162. The Nevada measure, said the court, "simply specifie[d] a means by which to assist the legislature whether to consent or not to consent to the proposed amendment." *Id.* at 163.

The Nevada Supreme Court's decision in *Kimble* is directly contrary to the decision reached by the Arkansas Supreme Court below. The Nevada court concluded that it

was "wholly impossible to construe [the proposal] as a limitation on legislative power violative of article V of the federal constitution." *Id.* at 162.

In *AFL-CIO v. March Fong Eu*, 686 P.2d 609 (1984), the Supreme Court of California confronted state-law popular-initiative language petitioning for an amendment to the U.S. Constitution. A portion of the language at issue in *Eu* was a "resolution urging Congress to submit a constitutional amendment to the states." *Id.* The resolution itself did not "call for a national convention, propose an amendment, or ratify an amendment." *Id.* The court concluded that the language did "not purport to bind Congress or the state Legislature to undertake any act of legal significance under article V." *Id.* at 622. The California Supreme Court said such language "does not attempt to invoke the application process of article V." *Id.* Accordingly, the court found that the initiative, "as it merely adopts a resolution urging Congress to submit a constitutional amendment to the states, and mandates the [state] Legislature to adopt that resolution, does not offend article V." *Id.* at 622.[11]

Finally, the Supreme Court of Alabama has determined that Article V is not violated by even a *binding* instruction to delegates for a state convention called to consider approval of a constitutional amendment. *In re Opinion of the Justices*, 148 So. 107 (Ala. 1933), approved

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[11] *Eu* also confronted language *compelling* the state legislature to apply for a constitutional convention *on pain of loss of salary*. The Supreme Court of California struck that language down because "[u]nder article V, the legislators must be free to vote their own considered judgment, being responsible to their constituents through the electoral process." *Id.* at 622.

a ballot providing for election of delegates to the convention called to consider repeal of the Eighteenth Amendment and adoption of the Twenty-First. (advisory opinion). The general election ballot (1) afforded voters a choice for or against repeal of the prohibition amendment and (2) required a sworn pledge that the elected delegate would abide by the choice of the majority of voters. Considering the compatibility of the measure with Article V, the court concluded that it was "unable to see in the Federal Constitution any purpose to prohibit a direct and binding instruction to the members of the convention voicing the consent of the governed." *Id.* at 111. The nonbinding directive-cum-informational-provision struck down below is far, far less restrictive of Article-V-related legislator activity than the measure approved by the Alabama high court.

The decision below conflicts directly with the foregoing cases. This Court should resolve that split of authority.

III. THE DECISION BELOW IS AT ODDS WITH A WELL-ESTABLISHED TRADITION OF NONBINDING INSTRUCTIONS BY VOTERS TO THEIR ELECTED OFFICIALS.

The Arkansas Supreme Court's decision also runs contrary to established historical practice in this country regarding the adoption of amendments to the United States Constitution. Review by this Court is necessary to examine the apparently unprecedented attempt by the Arkansas Supreme Court to use Article V to foreclose nonbinding constitutional-amendment-related instructions to legislators and to control what informational language may or may not appear on state election ballots.

As with unlimited Congressional terms today, the Constitution's original U.S. Senatorial selection regime presented a built-in tension between the interest of incumbent politicians in retaining their offices and the popular desire to place limitations on who should hold such offices. During the latter part of the 1800's, the people of many states grew increasingly troubled with the way in which their United States Senators were chosen (elected by state legislatures pursuant to U.S. Constitution article I, § 3). Accordingly, the people of many states sought direct popular election of U.S. Senators. Notwithstanding popular opinion — and in spite of the fact that a proposed popular-election amendment had been repeatedly approved by the House,[12] — the Senate (whose members owed their position to election by state legislators) consistently failed to send such an amendment to the states. The people of numerous states, therefore, took action to ensure the popular will.

Oregon took the lead in 1904 when it adopted a "direct" primary law through the people's initiative-and-referendum power. Under this law, candidates wishing to appear on the primary ballot for nomination to an office had to file a petition. In this petition, the candidates were allowed to include a statement not to exceed one hundred words, and on the ballot after the candidates' name, a statement not to exceed twelve words which would convey to voters the candidate's "measures or principles he especially advocates."[13]

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[12] "The House voted in favor of a [popular-election-of-Senators] amendment in 1893, 1894, 1989, 1900 and 1902. Each time the Senate refused." Ronald R. Rotunda, *The Aftermath of* Thornton, 13 Const. Comm. 201, 206 (Summer 1996).

[13] 45 Cong. Rec. 5823, 5826 (1910).

In addition to having a statement regarding the principles that the nominated candidate supported and would advocate, the candidate could also sign his name to one of two statements which would appear on the would-be candidate's nominating petition. Statement Number 1 read:

> I further state to the people of Oregon, as well as to the people of my legislative district, that during my term of office, I shall always vote for that candidate for United States Senator in Congress who has received the highest number of the people's votes for that position at the general election next preceding the election of a Senator in Congress without regard to my individual preferences.

Statement Number 2 read:

> During my term of office I shall consider the vote of the people for United States Congress as nothing more than a recommendation which I shall be at liberty to wholly disregard if the reason for doing so seems to me to be sufficient.[14]

Nebraska took this idea a step further in its primary election law. The state allowed candidates for the state legislature to sign a Statement Number One or a Statement Number Two identical to Oregon's for their nominating petitions. Candidates who signed Statement Number One would have printed after their names on the ballot,

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[14] *See* 1 George Haynes, *The Senate of the United States* 101 (1960) (quoting Oregon Primary Law, 1904).

"Promises to vote for the people's choice for United States Senator." The candidates who had signed Statement Number Two would have printed after their names on the ballot, "Will not promise to vote for the people's choice for United States Senator."[15]

In 1908, Oregon supporters of the direct election of Senators submitted a senatorial-selection bill to the people of Oregon by way of initiative. This bill, which became law, stated:

> Be it enacted by the people of the State of Oregon: SECTION 1. That we, the people of the State of Oregon, hereby instruct our representatives and senators in our legislative assembly, as such officers, to vote for and elect the candidates for United States Senators from this State who receive the highest number of votes at our general election.[16]

By passing this bill, the people were successful in having their state legislators vote for the people's choice for U.S. Senate.[17]

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[15] 1909 Laws of Neb., ch. 51, at 253.

[16] Text taken from Oregon Initiative Petition filed January 29, 1908 and approved at June 1, 1908 general election.

[17] Many states followed Oregon's lead. For example, Idaho enacted a primary election law in 1909 which allowed candidates for the nomination for state legislative office to sign a "declaration" with their nomination papers. The "declaration" was that if elected to the state legislature, the candidate would "always vote for the candidate for the United States Senator who has received a majority of the first choice votes upon my party ticket." Idaho Session Laws, House Bill

North Dakota followed suit. In *State v. Blaisdell*, 118 N.W. 141, 145 (N.D. 1908), the North Dakota Supreme Court upheld the provisions of North Dakota's primary election law which allowed the voters of each party to express their choice for Senator. The law passed muster, the court said, because it "merely permit[ted] an expression of choice by the voters, and by its provisions, in effect, provides a convenient method of exercising the constitutional right of petition." *Id.* at 147.[18]

No. 16 (1909). If the candidate made such a declaration on the nomination papers, on the official primary ballot near the candidate's name would appear, "Pledged to vote for party choice for U.S. Senator." *Id.*

[18] Several states have struck down attempts by the people *to control* the legislature's exercise of Article V power. In *Montana ex rel. Harper v. Waltermire*, 691 P.2d 826 (Mont. 1984), the Montana Supreme Court prevented an initiative from being placed on the ballot that would have "directed the Legislature to apply to Congress" for a balanced budget convention and *kept the legislature in session without compensation until the resolution was adopted*. *Id.* at 828. The Montana Supreme Court noted that such an initiative was an "external restriction[]" on the power of the legislature and therefore violated Article V. *Id.* at 830.

Similarly, in *AFL-CIO v. March Fong Eu*, 686 P.2d 609 (Cal. 1984), the California Supreme Court held that "the initiative, to the extent that it applies for a constitutional convention or requires the Legislature to do so, does not conform to article V of the United States Constitution." *Id.* at 613. In that case, the proposed state initiative allowed the people to submit an application for a convention for proposing amendments to the Constitution and *required the legislature to adopt such an application or lose all salary, benefits, and expenses*. *Id.* at 612. Since the legislature was compelled to act, the California Supreme Court struck down the initiative. It held that "[u]nder article V, the legislators must be free to vote their own considered judgment, being responsible to their constituents through the electoral process." *Id.* at 622 (emphasis supplied).

In *State v. Frear*, 125 N.W. 961 (Wis. 1910), the Wisconsin Supreme Court ruled that a Wisconsin primary law creating an advisory referendum on the popular choice for U.S. Senator did not require the candidates to pledge themselves to support any particular nominee. The Wisconsin Supreme Court concluded that:

> Construing the law as imposing no legal obligation on the part of any member of the Legislature to vote for his party nominee at the primary, we must assume that the legislators will vote according to their consciences and convictions, giving due weight to the advisory vote of the people, and that therefore neither the letter nor the spirit of the Constitution has been transgressed.

Id. at 972. The Court went on to explain that each citizen had a right to tell the legislature who his choice was for Senator and to ask the legislature to choose that candidate.

By 1912, 29 of the 48 states had in place comparable provisions for selecting the popular choice for U.S. Senator.[19] There can be no doubt that such measures created enormous political pressure on state legislators to select the popular preference. Indeed these measures taken by the States ultimately resulted in the ratification of the Seventeenth Amendment.

The pre-Seventeenth Amendment state cases reflect an accepted practice of using the ballot to instruct elected officials in the performance of their federal constitutional duties. And that practice illustrates a fundamental principle applicable to the term-limits amendment at issue here:

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[19] *See* Rotunda, 13 Const. Comm. at 207.

Where legislators remain free to vote their consciences and undertake pro-amendment action, anti-amendment action, or no action at all, Article V is not violated. This Court should affirm that principle in this case.

CONCLUSION

Thinking itself bound by a prior decision of this Court, the Supreme Court of Arkansas has used Article V of the United States Constitution to deprive the people of Arkansas of their right to vote on a duly certified ballot initiative; their right to instruct their representatives on a political issue of the highest importance; and their right to be informed about the results of those nonbinding instructions. The Chief Justice has called the centerpiece of the opinion below, the claim that a nonbinding referendum constitutes illicit participation in the amendment process, "not substantial." *Kimble*, 439 U.S. at 1387. Yet the Supreme Court of Arkansas has made the "not substantial" claim advanced in *Kimble* a requirement of the United States Constitution.

That erroneous application of Article V is sufficiently grave to require correction by this Court. Moreover, the decision creates a split of authority among state courts of last resort in need of final resolution. Finally, the decision is profoundly at odds with a tradition of nonbinding instructions to legislators and with the historic practice of informing the electorate through placement of informational provisions on the ballot.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

A.J. KELLY
THE KELLY
LAW FIRM
P.O. Box 251570
Little Rock, AR 72225

EMMET T. FLOOD*
MICHAEL R. POMPEO
WILLIAMS & CONNOLLY
725 Twelfth Street NW
Washington DC 20005
202-434-5000

STEPHEN J. SAFRANEK
University of Detroit-
Mercy Law School
651 E. Jefferson St.
Detroit, MI 48226

**Counsel of Record*

Attorneys for Petitioners Arkansas Term Limits, Frank Gilbert and Spencer G. Plumley

APPENDIX

APPENDIX

ORDER LIST

SATURDAY, NOVEMBER 2, 1996

ORDER IN PENDING CASES

A-310 ARKANSAS TERM LIMITS, ET AL., V. EUGENIA T. DONOVAN, ET AL.,

A-320 SHARON PRIEST, SECRETARY OF STATE OF ARKANSAS V. EUGENIA T. DONOVAN, ET AL.

The application for stay of the decision and mandate of the Supreme Court of Arkansas, case No. 96-1120, decided October 21, 1996, presented to Justice Thomas and by him referred to the Court are granted pending the timely filing and disposition in this Court of a petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay terminates automatically. In the event the petition for a writ of certiorari is granted, this stay shall continue pending the issuance of the mandate of this Court. Justice Stevens and Justice Ginsburg would deny the applications.

SUPREME COURT OF ARKANSAS

[931 S.W.2d 119]
No. 96-1120

EUGENIA T. DONOVAN,
Individually, and On Behalf of
All Others Similarly Situated,
PETITIONER,

V.

SHARON PRIEST, Secretary of
State of the State of Arkansas,
RESPONDENT,

ARKANSAS TERM LIMITS, FRANK
GILBERT, and SPENCER G. PLUMLEY,
INTERVENORS.

Opinion Delivered
Oct. 21, 1996

ORIGINAL ACTION

PETITION GRANTED

DONALD L. CORBIN, Associate Justice

Petitioner, Eugenia T. Donovan, citizen and taxpayer, asks this court to enjoin Respondent, Secretary of State Sharon Priest, from placing the proposed Amendment 9 to the Arkansas Constitution on the ballot for the general election an November 5, 1996. Petitioner also requests that any votes that may have already been cast for the proposed Amendment 9 not be counted. We allowed the intervention of three additional parties in this original action, which was filed pursuant to Amendment 7 to the Arkansas Constitution of 1874; "Arkansas Term Limits," the unincorporated sponsor of the proposed Amendment 9; Frank Gilbert,

Executive Director of "Arkansas Term Limits;" and Spencer G. Plumley, Chairman of "Arkansas Term Limits."

Petitioner asserts that the proposed Amendment 9 exceeds the legislative powers reserved to the people of this state by our Amendment 7 in that it directly contravenes the amendment process provided for in Article V of the United States Constitution.

Respondent and Intervenors contend that the proposed Amendment 9 does not exceed the powers of the people reserved in Amendment 7 and that, even if it did, Petitioner's challenge to the proposal is a question of substantive constitutional law that is not yet ripe for our review. Our jurisdiction to hear this case is original and exclusive pursuant to Amendment 7 of the Arkansas Constitution.

I. *Justiciability*

Respondent and Intervenors urge us to decline review of Petitioner's constitutional challenge to the proposed Amendment 9 because the issue is not ripe for adjudication and, as such, any opinion issued by this court on the matter would be purely advisory. Petitioner asserts that our review of the sufficiency of the petition for this proposed amendment, as provided in Amendment 7, necessarily encompasses the issue of whether the proposal is within the powers reserved to the people in Amendment 7. Petitioner argues that the people of this state do not have the right to propose such a measure as the proposed Amendment 9, which instructs the legislators of this state, along with the Arkansas delegation to Congress, to use all the powers of their respective offices in proposing and securing an amendment to the United States Constitution limiting the

number of terms members of Congress may serve. Petitioner asserts that the procedures for proposing amendments to the United States Constitution are specifically and exclusively provided for in Article V of that Constitution. Respondent and Intervenors counter that Petitioner's argument is nothing more than a substantive constitutional challenge to the proposal, and as such, our review of the issue is not proper unless and until the measure has become law.

Our reading of the proposed Amendment 9 indicates that it is procedural in nature, purporting to empower the electorate with an indirect and prohibited means to propose an amendment to the United States Constitution. Hence, we agree that the threshold issue presented requires an analysis of whether such a procedure is encompassed within the powers reserved to the people of this state in Amendment 7.

Amendment 7 to the Arkansas Constitution of 1874 provides in part:

> The legislative power of the people of this State shall be vested in a General Assembly, which shall consist of the Senate and House of Representatives, but *the people reserve to themselves the power to propose legislative measures, laws and amendments to the Constitution*, and to enact or reject the same at the polls independent of the General Assembly [.] [Emphasis added.]

Amendment 7 further provides that the sufficiency of statewide petitions for initiatives shall be decided in the first instance by the Secretary of State, subject to the review of the supreme court which has original and exclusive jurisdiction over such causes. Upon legal challenges to

initiative matters, Amendment 7 places the burden of proof "upon the person or persons attacking the validity of the petition." As to the scope of Amendment 7 and its incorporation of the reserved rights of the people, this court has previously observed that "[t]he voters of this state essentially have, *within constitutional limits,* a right to change any law or any provision of our Constitution they deem appropriate through Amendment 7 to the Constitution." *Dust v. Riviere*, 277 Ark. 1, 4, 628 S.W.2d 663, 665 (1982) (emphasis added). Clearly those constitutional limitations derive from both the United States Constitution and this state's constitution. On the federal level the rights reserved to the states and to the people of the states originate from the Tenth Amendment to the United States Constitution, which provides that "[t]he powers not delegated to the United States by the constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Thus, our Amendment 7 cannot empower the people of this state to initiate any measure, law, or amendment which falls outside the powers reserved to the states and their citizens by the United States Constitution. We understand this to be the essence of Petitioner's challenge.

This court has previously decided cases in which it reviewed the validity of the people's reserved powers of initiative and referendum. In *Czech v. Baer,* 283 Ark. 457, 677 S.W.2d 833 (1984), this court was presented with a challenge to the validity of a proposed local initiative. in determining that such a review of the initiative could be conducted by this court prior to the election, the majority opinion stated:

> At the outset the appellees argue that we should permit the measures to be placed on the ballot without first determining their validity. Certainly it

> is true that a party who resists an initiated petition on grounds such as insufficiency of signatures or improper ballot title is not required to question the validity of the proposed measure. On the other hand, *that question may be considered and decided when it is properly raised, even before the election. Proctor v. Hammans,* 277 Ark. 247, 640 S.W. 2d 800 (1982); *Hodges v. Dawdy,* 104 Ark. 583, 149 S.W. 656 (1912).

Id. at 459, 677 S.W.2d at 835 (emphasis added).

In *Hodges v. Dawdy*, 104 Ark. 583, 149 S.W. 656 (1912), this court considered our state's previous Initiative and Referendum Amendment, which is comparable to our present-day Amendment 7, together with its enabling clause and determined that it was the duty of this court to determine the validity of a proposed amendment before such became law. The court concluded that it must determine whether the proposed measure is *"subject to the initiative power of the people,* and that the petition is legally sufficient[.]" *Id.* at 591, 149 S.W. at 659 (emphasis added).

More recently in *Plugge v. McCuen,* 310 Ark. 654, 841 S.W.2d 139 (1992), this court declined to address the petitioners' substantive constitutional challenge as to whether a proposed measure conflicted with the Qualifications Clause of the United States Constitution. The majority opinion did, however, acknowledge that this court had previously addressed constitutional challenges to a proposal's validity, but limited such review to situations where the proposed measure was "clearly contrary to law" and, therefore, should not be submitted to the electorate. Id. at 660, 841 S.W.2d at 142. In addition to the consideration of whether a proposed measure is "clearly contrary to law," this court has indicated

that in determining whether an issue is justiciable, factors to be weighed include whether the issue at hand is a matter of significant public interest and a matter of constitutional law. *See U.S. Term Limits, Inc. v. Hill,* 316 Ark. 251, 872 S.W.2d 349 (1994); *Bryant v. English,* 311 Ark. 187, 843 S.W.2d 308 (1992).

It has been said that the pertinent issue in cases such as this one "is *not* the hypothetical question whether the law, if passed, would be constitutionally defective; rather, it is the present and ripe question whether the measure's proponents are entitled to invoke the direct legislation process at all." James D. Gordon III & David B. Magleby, *Pre-Election Judicial Review of Initiatives and Referendums,* 64 Notre Dame L. Rev. 298, 314 (1989) (emphasis added). We agree, especially when considering our decisions in *Czech, Hodges,* and *Plugge.* We also agree that a case such as this one is ripe for the following reasons: (1) The case is concrete and the record will not be improved by waiting until after the election is held; (2) the factual controversy -- whether procedural and subject-matter requirements have been met -- exists before the election; (3) post-election events will not sharpen the issues, as no additional facts are necessary for decision; and (4) the issue is not speculative nor hypothetical because the only constitutional issues involved are those that govern the proponents' right to invoke the direct-legislation process. *Id.*

Regarding justiciability in general, this court has previously stated that declaratory relief will lie where (1) there is a justiciable controversy; (2) it exists between parties with adverse interests; (3) those seeking relief have a legal interest in the controversy; and (4) the issues involved are ripe for decision. *U.S. Term Limits, Inc.,* 316 Ark. 251, 872 S.W.2d 349. Here, there is clearly a case in controversy

over the effect and application of the proposed Amendment 9 between parties with adverse interests. Certainly Petitioner as a citizen, resident, taxpayer, and registered voter has a legal interest in the controversy. An to the issue of ripeness, the federal courts have viewed it as largely a matter of timing. *Thorsted v. Gregoire,* 841 F. Supp. 1068 (W.D. Wash. 1994). In *Thorsted,* the district court pointed out that the United States Supreme Court has recognized the importance in deciding challenges to the constitutionality of election laws when it held that "[j]usticiability in such cases depends not so much on the fact of the past injury but on the prospect of its occurrence in an impending or future election." *Id.* at 1075 (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 300, n. 12 (1979)).

Other courts have conducted preelection reviews of a proposed measure's validity. In *Hawke v. Smith, No. 1,* 253 U.S. 221 (1920), the United States Supreme Court considered the issue of whether a proposed measure was constitutional under Article V of the United States Constitution before it had been enacted into law. The Supreme Court of California has interpreted *Hawke* as direct authority for the proposition that a state court can remove a proposed amendment from a state election ballot on the ground that it does not conform to Article V, and by implication, that a state court has authority to adjudicate that preelection question. *See, e.g., AFL-CIO v. Eu,* 686 P.2d 609 (Cal. 1984).

Based on the aforementioned decisions of this court as well as other courts, we hold that our review of the sufficiency of a proposed measure, as provided for in Amendment 7, includes a review of whether the measure's proponents are entitled to invoke the direct initiative process when such issue is properly presented. In so holding, we do

not conclude that we will entertain substantive constitutional challenges to a proposed measure, such as whether it violates the free speech provision of the First Amendment, before an election has been held. We distinguish such substantive constitutional challenges from procedural challenges in that the former necessarily involve fact-specific issues and thus are not ripe for review until the proposed measure becomes law and a case in controversy arises. Given that the review we are asked to conduct in this case is not one of direct review of the proposed amendment's validity, but rather one of whether the proposed amendment's advocates are entitled to invoke our initiative process in the first place, we will address the merits of Petitioner's challenge. Our discussion of this issue necessitates our review of the powers authorized by Article V of the United States Constitution and the case law that has interpreted those powers.

II. Constitutional Challenge

Article V of the United States Constitution provides in pertinent part:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress[.]

The pertinent sections of the proposed Amendment 9 provide as follows:

(e) It is the will of the people of the State of Arkansas that the following amendment be added to the United States Constitution:

Congressional Term Limits Amendment

Section a. No person shall serve in the office of United States Representative for more than three terms, but upon ratification of this amendment no person who has held the office of United States Representative or who then holds the office shall serve for more than two additional terms.

Section b. No person shall serve in the office of United States Senator for more than two terms, but upon ratification of this amendment no person who has held the office of United States Senator or who then holds the office shall serve more than one additional term.

Section c. This article shall have no time limit within which it must be ratified by the legislatures of three-fourths of the several states.

. . . .

(g) Each member of the Arkansas delegation to the United States Congress *is hereby instructed to use all of the powers of the Congressional Office to pass the Congressional Term Limits Amendment* set forth in subsection (e) above.

(h) All primary, general, and special election ballots *shall have* the information "DISREGARDED VOTER INSTRUCTION

ON TERM LIMITS" printed adjacent to the name of any United States Representative or United States Senator who:

(1) Failed to vote in favor of the Congressional Term Limits Amendment proposed in subsection (e) when brought to any vote;

(2) Failed to second the Congressional Term Limits Amendment proposed in subsection (e) if it lacked for a second before any proceeding of the legislative body;

(3) Failed to propose or otherwise bring to a vote of the full legislative body the Congressional Term Limits Amendment proposed in subsection (e) above if it otherwise lacked a legislator who so proposed or brought to a vote of the full legislative body the Congressional Term Limits Amendment proposed in subsection (e) above; or

(4) Failed to vote in favor of discharging the Congressional Term Limits Amendment proposed in subsection (e) before any committee or subcommittee upon which the legislator served in the respective legislative body; or

(5) Failed to vote against or reject any attempt to delay, table, or otherwise prevent a vote by the full legislative body on the Congressional Term Limits Amendment set forth in subsection (e); or

(6) Failed to vote against any term limits proposal with terms longer than those set forth

In the Congressional Term Limits Amendment proposed in subsection (e); or

(7) Sponsored or co-sponsored any proposed constitutional amendment or law that proposes term limits longer than those in the Congressional Term Limits Amendment set forth in subsection (e); or

(8) Failed to ensure that all legislative votes on congressional term limits were recorded and made available to the public.

. . . .

(k) The House of Representatives of the State of Arkansas, and the Arkansas Senate, due to the desire of the people of the State of Arkansas to establish term limits for the Congress of the United States, *are hereby instructed to make the following application to the United States Congress, pursuant to their powers under Article V of the United States Constitution,* to wit:

"We, the people and legislature of the State of Arkansas, due to our desire to establish term limits on the members of the Congress of the United States, hereby make application to the United States Congress, pursuant to our power under Article V of the United States Constitution, to call a convention for proposing amendments to the Constitution."

. . . .

(1) All primary, general, and special election ballots *shall have* the information "DISREGARDED VOTER INSTRUCTION ON TERM LIMITS" printed adjacent to the name of any state senator or state representative who:

(a) Failed to vote in favor of the application set forth in subsection (k) above when brought to a vote; or

(b) Failed to second the application set forth in subsection (k) above if it lacked a second; or

(c) Failed to vote in favor of all votes bringing the application set forth in subsection (k) above before any committee or subcommittee upon which the legislator served; or

(d) Failed to propose or otherwise bring to a vote of the full legislative body the application set forth in subsection (k) if it otherwise lacked a legislator who so proposed or brought to a vote of the full legislative body the application set forth above; or

(e) Failed to vote against any attempt to delay, table, or otherwise prevent a vote by the full legislative body on the application set forth in subsection (k) above; or

(f) Failed to ensure that all votes on the application set forth in subsection (k) were recorded and made available to the public; or

(g) Failed to vote against any change, addition, or modification to the application set forth in subsection (k) above; or

(h) Failed to attend a hearing, session, or vote of the legislative body concerning any aspect of consideration of the proposals in subsection (e) and subsection (k) above, where such failure to attend resulted in any failure to obtain a quorum sufficient to conduct business; or

(i) Failed to move for, second, or vote in favor of a roll-call vote on any aspect of consideration of the proposals in subsection (e) and subsection (k) above, where such failure resulted in the defeat of any aspect of subsection (e) and subsection (k) above, without recording the votes of individual legislators to be held accountable at a later time.

(j) Failed to vote against any effort to rescind the application.

(k) Failed to vote in favor of the amendment set forth in subsection (e) above, when the amendment was sent to the states for ratification; or

(*l*) Failed to vote against any term limits amendment with terms longer than the limits set forth in the proposed amendment in subsection (e) above, when such an amendment is sent to the states for ratification.

. . . .

> (n)(1) The Secretary of State of the State of Arkansas shall be responsible for making an accurate determination as to whether a candidate for state or federal legislative office shall have placed next to the candidates name on the election ballot the information "DISREGARDED VOTER INSTRUCTION ON TERM LIMITS" or the information "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" and for certifying the appropriate indication to the appropriate county clerks and other appropriate voting officials. [Emphasis added.]

It is clear from the aforementioned provisions that the proposed Amendment 9, which bears the popular name "THE CONGRESSIONAL TERM LIMITS AMENDMENT OF 1996," directs both state and federal legislators to use the power of their respective offices to advance the cause of adopting a proposed amendment to the United States Constitution that would limit the number of terms of United States Representatives and Senators. The proposed Amendment 9 also directs the General Assembly to use the power specifically granted to the state legislatures in Article V to ask the United States Congress to call a constitutional convention. The proposed Amendment 9 essentially provides for a vote of the people to initiate the application process for a constitutional convention and, likewise, it provides for a vote of the people to propose to Congress an amendment to the United States Constitution. In the event any individual legislator, state or federal, fails to do as instructed, the proposed Amendment 9 states that the words "DISREGARDED VOTER INSTRUCTION ON TERM LIMITS" shall be placed adjacent to their names on any ballots in future elections.

Respondent and Intervenors assert that the proposed Amendment 9 does not contravene Article V because it neither prevents nor compels any action by any legislator, state or federal; it merely puts the legislators on notice of the desire of the people to have term limits on members of Congress. Further, Respondents and Intervenors assert that the main focus of this proposed amendment is its provision for additional ministerial duties of the Secretary of State, and that there is no binding effect an any legislative power nor any penalty assessed to legislators. As discussed earlier, we limit our review to the only justiciable issue -- whether Amendment 7 reserves to the people of the State of Arkansas the power to propose amendments to the United States Constitution and to make application to Congress for a constitutional convention. In order to resolve this issue, it is helpful to review the case law interpreting the provisions of Article V.

In *Hawke,* 253 U.S. 221, the Supreme Court determined that a provision of the Ohio constitution extending the referendum to the ratification process of proposed amendments to the United States Constitution was in conflict with Article V. The Court stated that Article V provides for the proposal of constitutional amendments only by votes of two-thirds of both houses of Congress or upon application of the legislatures of two-thirds of the states, "thus securing deliberation and consideration before any change can be proposed." *Id.* at 226. The Court further stated that "[t]he language of the article is plain, and admits of no doubt in its interpretation. It is not the function of courts or legislative bodies, national or state, to alter the method which the Constitution has fixed." Id. at 227. The Court defined the term "legislatures" as the representative body which makes the laws of the people -- *not* the people themselves. *Id.* In concluding that the power to ratify a

proposed amendment to the United States Constitution is derived from that Constitution, the Court wrote:

> It is true that the power to legislate in the enactment of the laws of a State is derived from the people of the State. But the power to ratify a proposed amendment to the Federal Constitution has its source in the Federal constitution. *The act of ratification by the state derives its authority from the Federal Constitution to which the State and its people have alike assented.*

Id. at 230 (emphasis added). Ultimately, the Court held that Article V only authorized state legislatures (i.e. the law-making bodies themselves) to ratify Amendments to the United States Constitution. The Court thus concluded that the people, through the process of initiative and referendum, did not have the same power.

Two years after the decision in *Hawke,* the Supreme Court had another occasion to address the ability, or lack thereof, of the people of the states to ratify a proposed amendment to the United States Constitution. In *Leser v. Garnett,* 258 U.S. 130 (1922), the Court held that any measure which purports to place the power to ratify proposed amendments to the United States Constitution in the hands of the people of the states, and which takes such power away from the state legislatures is unconstitutional because it conflicts with Article V. The Court held:

> [T]he function of a state legislature in ratifying a proposed amendment to the Federal Constitution, like the function of Congress in proposing the amendment, is a *federal function* derived from the

> Federal Constitution; and it *transcends any limitations sought to be imposed by the people of a State.*

Id. at 137 (citations omitted) (emphasis added).

Respondent and Intervenors argue that neither *Hawke* nor *Leser* is applicable to the situation presented in this case because both cases pertain only to the ratification clause of Article V. Instead, they assert that *Kimble v. Swackhamer*, 439 U.S. 1385 (Rehnquist, Circuit Justice 1978) is controlling. Their reliance on *Kimble* is misplaced however, as the factual scenario presented in *Kimble* is opposite to that in the instant case. In *Kimble*, the Nevada state legislature had requested an advisory referendum from the people as to their positions on the proposed Equal Rights Amendment to the United States Constitution, ostensibly for the purpose of polling their constituents. Justice Rehnquist, acting in his capacity as Circuit Justice, concluded that the citizen participation in the amendatory process in that particular instance was not unconstitutional because of the *nonbinding* character of the referendum. While acknowledging the soundness of the previous holdings in *Hawke* and *Leser*, Justice Rehnquist concluded that neither of those cases ruled out "communication" between legislators and their constituents. Id. at 1387-88. That is not the case with proposed Amendment 9, which we conclude goes beyond a mere advisory referendum or a nonbinding communication between legislators and citizens.

In *State ex rel. Harper v. Waltermire*, 691 P.2d 826 (1984), the Supreme Court of Montana considered the issue of whether the people of that state could dictate to the state legislature that an application be made to Congress to call a constitutional convention. Specifically, the proposed ballot measure, not unlike the one at hand, directed the Montana

Legislature to submit application to Congress for a constitutional convention in order to propose a balanced-budget amendment to the United States constitution. The measure further provided that if the state legislature failed to make such application within ninety days, it had to remain in session, with only three days of permissible recess and without pay to the legislators until such application was made.

Relying on the holdings of *Hawke* and *Leser*, the Montana court held that the word "legislatures," as used in both the ratification clause and the proposal clause of Article V, referred to the legislative bodies of the states. The court reasoned that the framers of the United States Constitution would not have ascribed different meanings to the two instances in Article V where the word "legislatures" is found. The court further echoed the framers' sentiments that the amendatory process should be deliberate, holding that "whenever a state legislature acts to amend the United States Constitution under Article V powers, the body must be a deliberative representative assemblage acting in the absence of any external restrictions or limitations." *State ex rel. Harper*, 691 P.2d at 830.

The sponsors of the Montana measure argued, just as Respondent and Intervenors do in this case, that the initiative was merely a nonbinding recommendation to the legislature. In rejecting that argument, the Montana court pointed to the express language directing the actions of the legislature as well as the consequences for not following those directions, namely that the legislature would be kept in "perpetual session" and, after a period of ninety days, legislators would no longer receive compensation. *Id.* The court determined that such restrictions violated the spirit of Article V as interpreted in *Hawke* and *Leser*. Finally, the court

concluded that "[l]legislative deliberation cannot exist where the outcome is a predetermined specific action. . . . The people through initiative cannot affect the deliberative process." *State ex rel. Harper,* 691 P.2d at 830-31.

In *Eu*, 686 P.2d 609, the Supreme Court of California considered the constitutionality of a similar proposed ballot measure. The proposed measure at issue there would have compelled the California Legislature, on penalty of loss of salary, to apply to Congress to call a constitutional convention for the purpose of proposing a balanced-budget amendment. In concluding that the proposed measure did not conform to Article V of the United States Constitution, the court stated:

> Article V provides for application by the "Legislatures of two-thirds of the several States," not by the people through the initiative; it envisions legislators free to vote their best judgment, responsible to their constituents through the electoral process, not puppet legislators coerced or compelled by loss of salary or otherwise to vote in favor of a proposal they may believe unwise.

Id. at 613.

The California court reasoned that the purpose of that state's initiative process is to allow a means of enacting legislation, *not* a means of conducting public opinion polls. The court stated that the voters were not without remedy, as they had ample opportunity to make their views known to the various candidates through the campaign process. The court acknowledged that the United States Supreme Court had not yet addressed this particular issue involving Article V's proposal clause, but it found the Court's previous

interpretations of Article V's ratification clause to be persuasive. Furthermore, the court cited with approval an earlier determination by the Supreme Judicial Court of Massachusetts that the reference to "legislatures" in the proposal clause, like that in the ratification clause, meant the legislative body of a state, not the whole legislative process. *Eu*, 686 P.2d at 620 (citing *Opinion of the Justices to the Senate*, 366 N.E.2d 1226 (Mass. 1977)).

The California court further submitted that the framers of the United States Constitution knew exactly what distinction they were making in providing that only "Legislatures" were able to make application to Congress to convene a constitutional convention. Relying on the constitutional analysis in *Hawke*, 253 U.S. 221, and *Barlotti v. Lyons*, 189 P. 282 (Cal. 1920), the court wrote:

> The framers were, of course, aware of the difference between a representative body and the electorate as a whole; they knew that a legislature is a deliberative body, empowered to conduct hearings, examine evidence, and debate propositions. Its members may be assumed generally to hold views reflecting the popular will, but no one expects legislators to agree with their constituents on every measure coming before that body. Yet, although undoubtedly aware that the views of a deliberative body concerning a proposed amendment might depart from those of a majority of the voters, the *framers of the Constitution chose to give the voters no direct role in the amending process;* legislatures alone received the power to apply for a national convention, and legislatures or conventions, as Congress chose, the power to ratify amendments.

> The only conclusion we can draw from this fact is that the drafters wanted the amending process in the hands of a body with the power to deliberate upon a proposed amendment and, after considering not only the views of the people but the merits of the proposition, to render a considered judgment. *A rubber stamp legislature could not fulfill its function under article V of the Constitution.*

Eu, 686 P.2d at 621 (footnote omitted) (emphasis added).

Most recently, the Supreme Judicial Court of Maine was asked by its house of representatives for an opinion on a proposed initiative measure comparable to the proposed Amendment 9. In *Opinion of the Justices,* 673 A.2d 693 (1996), the Maine court stated that neither the electors of that state nor the state's legislature may control the delegates to Congress in the performance of their duties, because "[s]uch an exercise of control would violate the essence of federalism." *Id.* at 696. The court recognized that once elected by the people of the state, Congressional representatives act on behalf of the nation as a whole. *Id.* In reviewing the proposed initiative under the provisions of Article V, the court held that "it is not within the power of the electors to propose a constitutional amendment. The proposed initiative, if enacted by a referendum vote, would allow the electors to do indirectly that which they are forbidden to do directly." *Id.* at 697.

These three cases from Montana, California, and Maine, along with the Supreme Court cases interpreting Article V's ratification clause, are persuasive authority for Petitioner's proposition that Article V prohibits the action proposed by the measure at hand. Clearly, the proposed Amendment 9 is nothing more than a coercive attempt to

compel the Arkansas General Assembly to do as the alleged majority of the people wish, without any intellectual debate, deliberation, or consideration of whether such action is in the best interest of all the people of this state. This intent is clear from the language of the proposed Amendment 9 that the legislators are *hereby instructed* to do as told. Although the proposed Amendment 9 does not compel such action by the legislature on threat of loss of salary, it is nonetheless binding on the legislators in an extortive manner as failure to heed the amendment's instructions will result in their threatened potential political deaths. Contrary to what Respondent and Intervenors contend, the proposed duties to be given to the Secretary of State by Amendment 9 are not merely ministerial; rather, they amount to substantive penalties that are equivalent to an officially sanctioned recommendation by the State of Arkansas not to vote for such candidates because they disregarded the instructions and wishes of the voters. If, as Respondent and Intervenors assert, the proposed measure is merely a nonbinding attempt to communicate the desire of the people for term limits, than their remedy is to voice their desires at the polls by voting for candidates who share those beliefs.

The proposed Amendment 9 is clearly violative of the provision in Article V of the United States Constitution that all proposals of amendments to that Constitution must come either from Congress or state legislatures -- not from the people. It is an indirect attempt to propose an amendment to the United States Constitution, and as such violates the narrow, specific grants of authority provided in Article V. The proposed Amendment 9 would virtually tie the hands of the individual members of the General Assembly such that they would no longer be part of a deliberative body acting independently in exercising their individual best judgments on every issue. Consequently, the measure is an

impermissible use of the initiative power reserved to the people of this state in Amendment 7 to the Arkansas Constitution and is clearly contrary to law. *See Plugge*, 310 Ark. 654, 841 S.W.2d 139.

Intervenors raise the issue in their reply brief that placing the information "DISREGARDED VOTERS INSTRUCTION ON TERM LIMITS" adjacent to candidates' names on election ballots is constitutionally permissible as a time, place, and manner regulation under the Elections Clause of Article 1, Section 4, of the United States Constitution. Because we conclude that the proposed Amendment 9 exceeds the scope of the powers reserved to the people in Amendment 7, we need not address this issue. We thus enjoin Respondent from placing the proposed Amendment 9 on the ballot, or alternatively from declaring the results. The mandate is ordered issued on Friday, October 25, 1996, unless a petition for rehearing if filed. If a petition for rehearing is filed, briefing will be on an expedited basis to be set by the clerk.

Petition granted.

GLAZE, J., concurs in the result reached.

[Text of Amendment 9]

Whereas career politicians dominating Congress have a conflict of interest that prevents them from enacting meaningful term limits and making Congress what the founders intended, the branch of government most responsive to the electorate; and

Whereas career politicians, while refusing to heed the desire of the people for meaningful term limits, amassed a nearly five trillion dollar national debt by not only voting year after year to spend far more than they have taken in, but also by voting to increase dramatically their own pay, and also providing lavish pensions for themselves and granting themselves numerous other privileges at the expense of the people; and

Whereas such irresponsible actions on the part of career politicians have mortgaged the future of not only every American citizen, but also their children and grandchildren; and

Whereas the abuse of power, the corruption, and the appearance of corruption brought about by political careerism is ultimately destructive to representative government by making Congress increasingly distant from the people; and

Whereas the President of the United States is limited to two terms in office by the 22nd Amendment to the United States Constitution, and governors in forty (40) states am limited by those states laws to two terms or less; and

Whereas voters have established term limits for more than 2,000 state legislators, as well as more than 17,000

local officials across the nation, including state legislators and statewide elective officeholders in Arkansas; and

Whereas in 1992, the people of the State of Arkansas enacted, by an overwhelming majority, an amendment to the state constitution limiting service in the United States House of Representatives to three terms and in the United States Senate to two terms, and which state-imposed Congressional term limits were ruled unconstitutional by the United States Supreme Court; and

Whereas the United States Congress has ignored the desire of the people for meaningful term limits by refusing to submit to the states for ratification an amendment instituting Congressional term limits, and by proposing exceedingly long limits for its own members; and

Whereas it is the people themselves, not the United States Congress, who have in the past by majority vote, and should in the future set limits for the terms of Congressional offices; and

Whereas the people have a sovereign right and a compelling interest in the creation and preservation of a citizen Congress that will more effectively protect the freedom and prosperity of the people, which interest and right may not be as effectively served in any way other than that proposed by this amendment
to the Arkansas State Constitution; and

Whereas with foresight and wisdom our founders, under Article V of the United States Constitution, did provide the people with a procedure by which to overcome Congressional self-interest, by which procedure the people of the several states may call a convention to propose

amendments to the United States Constitution when two-thirds or thirty-four (34) states expressly call for a convention; and

Whereas amendments proposed by such a convention would become a part of the United States Constitution upon the ratification of three-fourths of the states (38); and

Whereas the people of the State of Arkansas desire to amend the United States Constitution to establish term limits on Congress to ensure representation in Congress by true citizen lawmakers;

Therefore, be it enacted by the people of the State of Arkansas:

Section 1: Section 3 of Amendment 73 to the Arkansas Constitution is hereby amended to add to the current language the following subsections:

(c) The foregoing provisions in sections (a) and (b) shall be revived upon passage of appropriate federal laws.

(d) It is the official position of the people of the State of Arkansas that all of our elected officials should vote to enact, by amendment to the United States Constitution, term limits for members of the United States Congress that are not longer than: three (3) two-year terms in the United States House of Representatives, nor two (2) six-year terms in the United States Senate, respectively.

(e) It is the will of the people of the State of Arkansas that the following amendment be added to the United States Constitution:

Congressional Term Limits Amendment

Section a. No person shall serve in the office of United States Representative for more then three terms, but upon ratification of this amendment no person who has held the office of United States Representative or who then holds the office shall serve for more than two additional terms.

Section b. No person shall serve in the office of United States Senator for more than two terms, but upon ratification of this amendment no person who has held the office of United States Senator or who then holds the office shall serve more than one additional term.

Section c. This article shall have no time limit within which it must be ratified by the legislatures of three-fourths of the several states.

(f) (1) As provided in this subsection, and in subsections (h) and (j) of this section, at each primary, special, and general election for the office of a United States Representative, United States Senator, or any state legislator, the ballot shall inform voters regarding any incumbent and non-incumbent candidates failure to support the Congressional Term Limits Amendment proposed above.

(g) Each member of the Arkansas delegation to the United States Congress is hereby instructed to use all of the powers of the Congressional office to pass the Congressional Term Limits Amendment set forth in subsection (e) above.

(h) All primary, general, and special election ballots shall have the information "DISREGARDED VOTER INSTRUCTION ON TERM LIMITS" printed adjacent to the name of any United States Representative or United States Senator who:

(1) Failed to vote in favor of the Congressional Term Limits Amendment proposed in subsection (e) when brought to any vote;

(2) Failed to second the Congressional Term Limits Amendment proposed in subsection (e) if it lacked for a second before any proceeding of the legislative body;

(3) Failed to propose or otherwise bring to a vote of the full legislative body the Congressional Term Limits Amendment proposed in subsection (e) above if it otherwise lacked a legislator who so proposed or brought to a vote of the full legislative body the Congressional Term limits Amendment proposed in subsection (e) above; or

(4) Failed to vote in favor of discharging the Congressional Term Limits Amendment proposed in subsection (e) before any committee or subcommittee upon which the legislator served in the respective legislative body; or

(5) Failed to vote against or reject any attempt to delay, table, or otherwise prevent a vote by the full legislative body on the Congressional Term Limits Amendment set forth in subsection (e); or

(6) Failed to vote against any term limits proposal with terms longer than those set forth in the Congressional Term Limits Amendment proposed in subsection (e); or

(7) Sponsored or co-sponsored any proposed constitutional amendment or law that proposes term

limits longer than those in the Congressional Term Limits Amendment set forth in subsection (e); or

(8) Failed to ensure that all legislative votes on congressional term limits were recorded and made available to the public.

(i) The information "DISREGARDED VOTER INSTRUCTION ON TERM LIMITS" shall not appear adjacent to the names of candidates for Congress if the Congressional Term Limits Amendment set forth in subsection (e) is before the states for ratification or has become a part of the United States Constitution.

(j) Notwithstanding any other provision of Arkansas law:

(1) A non-incumbent candidate for the office of United Slates Representative, United States Senator, state representative, or state senator, shall be permitted to sign a "term limits" pledge each time the non-incumbent files as a candidate for such an office. A candidate who declines to sign the "term limits" pledge shall have "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" printed adjacent to the candidates name on the election ballot;

(2) Each time a non-incumbent candidate for United States Senator, United States Representative, state senator, or state representative files for candidacy for those offices, the candidate shall be offered the "term limits" pledge until the United States Constitution has been amended to limit United States Senators to two terms in office and United States Representatives to three terms in office;

(3) The "term limits" pledge that each non-incumbent candidate for state and federal legislative offices shall be offered is as follows:

"I support Congressional term limits and pledge to use all of my legislative powers to enact the proposed Congressional Term Limits Amendment set forth in the Congressional Term Limits Amendment of 1996. If elected, I pledge to act and to vote in such a way that the information 'DISREGARDED VOTER INSTRUCTION ON TERM LIMITS' will not appear next to my name."
The pledge form will provide a space for the signature of the candidate and the date of the signature.

(k) The House of Representatives of the State of Arkansas, and the Arkansas Senate, due to the desire of the people of the State of Arkansas to establish term limits for the Congress of the United States, are hereby instructed to make the following application to the United States Congress, pursuant to their powers under Article V of the United States Constitution, to wit:

"We, the people and legislature of the state of Arkansas, due to our desire to establish term limits on the members of the Congress of the United States, hereby make application to the United States Congress, pursuant to our power under Article V of the United States Constitution, to call a convention for proposing amendments to the Constitution."

(*l*) Each state legislator is hereby instructed to use all powers delegated to each legislator to pass the Article V application to the United States Congress set forth in subsection (k) above, and to ratify, if proposed, the Congressional Term Limits Amendment set forth above.

(m) Not withstanding any other provision of Arkansas law:

(1) All primary, general, and special election ballots shall have the information "DISREGARDED

VOTER INSTRUCTION ON TERM LIMITS" printed adjacent to the name of any state senator or state representative who:

(a) Failed to vote in favor of the application set forth in subsection (k) above when brought to a vote; or

(b) Failed to second the application set forth in subsection (k) above if it lacked a second; or

(c) Failed to vote in favor of all votes bringing the application set forth in subsection (k) above before any committee or subcommittee upon which the legislator served; or

(d) Failed to propose or otherwise bring to a vote of the full legislative body the application set forth in subsection (k) if it otherwise lacked a legislator who so proposed or brought to a vote of the full legislative body the application set forth above; or

(e) Failed to vote against any attempt to delay, table, or otherwise prevent a vote by the full legislative body on the application set forth in subsection (k) above; or

(f) Failed to ensure that all votes on the application set forth in subsection (k) were recorded and made available to the public; or

(g) Failed to vote against any change, addition, or modification to the application set forth in subsection (k) above; or

(h) Failed to attend a hearing, session, or vote of the legislative body concerning any aspect of consideration of the proposals in subsection (e) and subsection (k) above, where such failure to attend resulted in any failure to obtain a quorum sufficient to conduct business; or

(i) Failed to move for, second, or vote in favor of a roll-call vote on any aspect of consideration of the proposals in subsection (e) and subsection (k) above, where such failure resulted in the defeat of any aspect of subsection (e) and subsection (k) above, without recording the votes of individual legislators to be held accountable at a later time.

(j) Failed to vote against any effort to rescind the application.

(k) Failed to vote in favor of the amendment set forth in subsection (e) above, when the amendment was sent to the states for ratification; or

(*l*) Failed to vote against any term limits amendment with terms longer than the limits set forth in the proposed amendment in subsection (c) above, when such an amendment is sent to the states for ratification.

(2) The information "DISREGARDED VOTER INSTRUCTION ON TERM LIMITS" as required by any of subsections (1)(a) through (1)(j) shall not appear adjacent to the names of candidates for the state legislature if the State of Arkansas has made application to Congress for a convention for proposing amendments to the United States Constitution pursuant to this amendment and such application is currently effective, has not been withdrawn, and has not expired.

(3) The information "DISREGARDED VOTER INSTRUCTION ON TERM LIMITS" as required by either of subsections (l)(k) or (l)(*l*) shall not appear adjacent to the names of candidates for the state legislature if: the Congressional Term Limits Amendment set forth above has been submitted to the states for ratification and ratified by the Arkansas legislature; or the Congressional Term Limits Amendment set forth and proposed in subsection (e) has become a part of the United States Constitution.

(n)(1) The Secretary of State of the State of Arkansas shall be responsible for making an accurate determination as to whether a candidate for state or federal legislative office shall have placed next to the candidate's name on the election ballot the information "DISREGARDED VOTER INSTRUCTION ON TERM LIMITS" or the information "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" and for certifying the appropriate indication to the appropriate county clerks and other appropriate voting officials.

(2) The Secretary of State, in accordance with subsection (l) of this subsection, shall be responsible for making an accurate determination from any reliable source.

(3) The Secretary of State shall consider timely submitted public comments prior to making the determination required in subsection (l) of this subsection.

(4) The Secretary of State, in accordance with subsections (1), (2), and (3) of this subsection shall determine and declare what information, if any, shall appear adjacent to the names of each incumbent state and federal legislator if the incumbent were to be a candidate in the next general election and shall certify such information to the appropriate county clerks and other appropriate voting officials.

In the case of United States Representatives and United States Senators, this determination, declaration, and certification shall be made in a fashion necessary to ensure orderly printing of primary and general election ballots with allowance made for all legal action provided in subsections (5), (6) and (7), below, and shall be based upon each Congressional member's actions during their current term of office and any actions taken in any concluded term, if such action was taken after the determination and declaration was made by the Secretary of State previously.

In the case of incumbent state legislators, this determination and declaration shall be made not later than thirty (30) days after the end of the regular session following each general election, and shall be based upon legislative action in the previous regular session or any action taken in any special session in the previous four (4) years, but in no event upon any actions taken before the adoption of this amendment.

The Secretary of State shall provide official notification to the incumbents by certified mail and to the public by official media statement and legal publication in a newspaper of statewide circulation at least two separate times prior to the election, in accordance with the time frames set forth herein.

(5) The Secretary of State shall determine, declare, and certify what information, if any, shall appear adjacent to the names of non-incumbent candidates for state and federal legislator, not later than five (5) business days after the deadline for filing for the office. The Secretary of State shall provide official notification to the candidate by certified mail and to the public by official media statement and legal publication in a newspaper of statewide circulation at least two separate times prior to the election, in accordance with the time frames set forth herein.

(6) If the Secretary of State makes the determination that the information "DISREGARDED VOTER INSTRUCTION ON TERM LIMITS" or "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" shall not be certified for placement on the ballot adjacent to the name of a candidate for senator or representative for state or federal office, any candidate or elector may appeal such decision to the Arkansas Supreme Court as an original action within five (5) business days after the second official limits newspaper publication of the determination by the Secretary of State or shall waive any right to appeal such

decision. The burden of proof shall be upon the Secretary of State to demonstrate by clear and convincing evidence that the candidate has met the requirements set forth in this act and therefore should not have the information "DISREGARDED VOTER INSTRUCTION ON TERM LIMITS" or "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" printed on the ballot adjacent to the candidates name.

(7) If the Secretary of State determines that the information "DISREGARDED VOTER INSTRUCTION ON TERM LIMITS" or "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" shall be certified for placement on the ballot adjacent to a candidates name for a senator or representative for state or federal office, the candidate may appeal such decision to the Arkansas Supreme Court as an original action within five (5) business days after receipt of notification or shall waive any right to appeal such decision. The burden of proof shall be upon the candidate to demonstrate by clear and convincing evidence that the candidate should not have the information "DISREGARDED VOTER INSTRUCTION ON TERM LIMITS" or "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" printed on the ballot adjacent to the candidates name.

(o) The Arkansas Supreme Court shall hear the appeal provided for in subsections (n)(6) and (n)(7) of this section, on an expedited basis as the first priority among any Supreme Court cases, and shall issue its decision on an expedited basis before any other civil appeals are resolved after submission of the matter to the Arkansas Supreme Court. Failure of the Arkansas Supreme Court to render a timely decision will require the Secretary of State to certify the challenged language for placement on the ballot next to the candidates name.

(p) At such time as the Congressional Term Limits Amendment set forth in subsection (e) has become a part of the United States Constitution, subsections (e) through (o) of this amendment automatically shall be repealed.

(q) Repealer. All laws in conflict with the foregoing are hereby repealed.

(r) Severability. If any portion, clause, or phrase of this amendment is for any reason held to be invalid or unconstitutional by a court of competent jurisdiction, the remaining portions, clauses, and phrases shall not be affected, but shall remain in full force and effect.

Supreme Court, U.S.
FILED
JAN 24 1997
CLERK

Nos. 96-903, 96-919

In the Supreme Court of the United States

OCTOBER TERM, 1996

ARKANSAS TERM LIMITS, ET AL.,
Petitioners,

v.

EUGENIA T. DONOVAN,
Respondent.

STATE OF ARKANSAS,
Petitioner,

v.

EUGENIA T. DONOVAN, ET AL.,
Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF OF RESPONDENT EUGENIA T. DONOVAN IN OPPOSITION

ELIZABETH ROBBEN MURRAY
Counsel of Record
ROBERT S. SHAFER
Friday, Eldredge & Clark
400 West Capitol Avenue
Little Rock, AR 72201
(501) 376-2011

LOUIS R. COHEN
JONATHAN J. FRANKEL
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, DC 20037
(202) 663-6000

January 24, 1997

QUESTION PRESENTED

Whether a state constitutional provision instructing state legislators to take specified actions to pass a proposed amendment to the United States Constitution violates Article V of the Constitution.

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF OF RESPONDENT EUGENIA T. DONOVAN IN OPPOSITION

Respondent Eugenia T. Donovan respectfully requests that this Court deny the petitions for a writ of certiorari to review the decision and judgment of the Supreme Court of Arkansas entered on October 21, 1996, and the mandate of that court issued on October 28, 1996.

COUNTERSTATEMENT

A. The Arkansas Initiative

Both petitions are far too modest about the purposes and effects of Amendment 9 to the Arkansas Constitution. Amendment 9 is not merely "[voters] expressing their views through the initiative process" (96-919 Pet. 4), and it is surely not "nonbinding" (96-903 Pet. i *et passim*). Amendment 9 is a permanent, detailed set of state constitutional "instructions" to present and future state legislators and Members of Congress from Arkansas as to how they shall vote, under every circumstance its drafters could think of, with respect to a specific potential amendment to the U.S. Constitution. If it is valid, then state legislators and Members of Congress who fail to follow these instructions are breaking state law.

Amendment 9 sets forth the full and exact text of a potential amendment to the Constitution (called the "Congressional Term Limits Amendment"; hereinafter, "CTLA") fixing term limits for service in Congress. In general, CTLA provides that no person may serve more than three terms in the U.S. House of Representatives (except that incumbents may serve not more than two additional terms); that no person may serve more than two terms in the U.S. Senate (incumbents may serve one additional term); and that there shall be "no time limit" for ratification by three-fourths of the states.

Amendment 9 commands both state legislators and Members of Congress to take specific steps to add CTLA to the Constitution. With respect to Members of Congress, it first provides, in general, that each Member from Arkansas "'is hereby *instructed to use all of the powers of the Congressional office to pass the Congressional Term Limits Amendment* set forth . . . above.'" Pet. App. A7 (emphasis added by Arkansas

Supreme Court).[1/] It then details these "instruct[ions]," directing Members, *inter alia*, "to vote in favor of [CTLA] when brought to any vote" (*id.*); "to second [CTLA]" (*id.* at A8-9); and to take specified actions to bring CTLA out of committee for a vote of the full House or Senate (*id.*). Moreover, Amendment 9 forbids Members from supporting competing term limits proposals, directing them to vote *against* any term limits proposal with longer term limits. *Id.*

Amendment 9 also commands the whole Arkansas legislature to apply to Congress to call a constitutional convention under Article V: both houses of the state legislature "'are *hereby instructed to make the following application to the United States Congress* [the required application is then set forth verbatim]'" (Pet. App. A9)(emphasis added by Arkansas Supreme Court). Amendment 9 then details these "instruct[ions]," directing Members, *inter alia*, "to vote in favor of the application" (*id.* at A9); "to second the application" (*id.*); to vote to bring the application before committees or subcommittees and to bring it to a vote of the full legislative body (*id.* at A9-10); "to vote against any attempt to delay, table, or otherwise prevent a vote . . . on the application" (*id.* at A10); "to vote against any change" in the application" (*id.*); and "to vote in favor of [CTLA when] sent to the states for ratification" (*id.*). Like Members of Congress, state legislators are instructed to vote *against* any constitutional amendment with longer limits. *Id.* at A10-11.

Amendment 9 then says that any Member of Congress or state legislator who fails to follow any of these instructions shall have the words "DISREGARDED VOTER

[1/] References to "Pet. App." are to the Appendix to the Petition for a Writ of Certiorari in No. 96-919.

INSTRUCTION ON TERM LIMITS" printed in capital letters adjacent to his or her name on every future primary, general election, and special election ballot. *Id.* (capitals in original). The Secretary of State, an elected official, is "responsible for making an accurate determination as to whether a candidate for state or federal legislative office" shall be so branded. Pet. App. A11. The brand is apparently to be applied regardless of how long after 1996 the disobedience occurs, and in every election for the remainder of the legislator's political life, apparently even after CTLA has been added to the Constitution.

On its face, the label "DISREGARDED VOTER INSTRUCTION," with its message of disdain for voter sentiment, is a blunt and potentially very misleading instrument. There is no ballot space for an explanation that, for example, (i) the legislator's own district constituents favor what the legislator did; or (ii) the voters of Arkansas, given only a yes/no vote on a 4 1/2-page amendment, do not necessarily favor all the features of it, such as calling a constitutional convention and opposing competing term limits proposals; or (iii) the legislator believes voter sentiments have changed since 1996.

B. Decision Below

Respondent Donovan brought an original action in the Arkansas Supreme Court, alleging that the people of Arkansas do not have power to adopt Amendment 9. The court agreed, ruling that Amendment 9 is beyond the powers of the people under Amendment 7 to the state constitution because it contravenes Article V of the U.S. Constitution. Pet. App. A18.

The Arkansas Supreme Court did not rule, as the State's petition implies (96-919 Pet. 4), that Article V bars "the people

of the several states . . . from expressing their views through the initiative process in favor of particular constitutional amendments." On the contrary, the court carefully distinguished between initiatives that merely "express [voters'] views" for the guidance of legislators and initiatives that foreclose legislators' independent deliberations and decisions by ordering them to act in a specified way.

The court (which was of course interpreting a proposed *state* constitutional provision), held that Amendment 9 sets forth a binding command, enforced through state-imposed sanctions. The court said,

> It is clear from the aforementioned provisions that the proposed Amendment 9 . . . *directs* both state and federal legislators [to act in favor of CTLA]. The proposed Amendment 9 also *directs* the General Assembly to . . . ask the United States Congress to call a constitutional convention. The proposed Amendment 9 essentially provides for a vote of the people [rather than the legislature] to initiate the application process for a constitutional convention.

Pet. App. A11 (emphasis added). The state court explained further:

> Clearly, the proposed Amendment 9 is nothing more than a coercive attempt to compel the Arkansas General Assembly to do as the alleged majority of the people wish, without any intellectual debate, deliberation, or consideration of

> whether such action is in the best interest of all the people of this state. This intent is clear from the language of the proposed Amendment 9 that the legislators *are hereby instructed* to do as told. Although the proposed Amendment 9 does not compel such action by the legislature on threat of loss of salary, it is nonetheless *binding* on the legislators
>
> . . . .

Pet. App. A17 (first emphasis in original; second emphasis added). The Court repeated for emphasis, "The proposed Amendment 9 would virtually tie the hands of the individual members of the General Assembly . . . [who] would no longer be part of a deliberative body acting independently in exercising their individual best judgments on every issue." Pet. App. A17.

Turning to the question of whether these state commands violate Article V, the Arkansas Supreme Court carefully examined the precedents in this Court, the lower federal courts, and state courts, and it discerned a clear line of distinction. Initiatives and referenda that are merely "advisory" (Pet. App. A13), providing "nonbinding communication" (*id.*) as to the people's positions on proposed amendments to the U.S. Constitution, are proper. But initiatives and referenda that *command* legislatures to take specific action on constitutional amendments violate Article V, because the Framers deliberately gave the amendment functions to state and federal legislatures, not to the people of the states. Finding that Amendment 9 "clearly" (Pet. App. A17) fell on the wrong side of that line, the court ruled that it would violate Article V.

The Arkansas Supreme Court enjoined the Secretary of State from placing the initiative on the ballot. On November 2, 1996, this Court stayed the state court's decision pending consideration of petitions for certiorari.

ARGUMENT

The Arkansas court held that Amendment 9 violates Article V because it takes decisionmaking authority with respect to a specific U.S. constitutional amendment away from the state legislature, replacing its deliberative processes with fixed state constitutional "instructions" that are both legally binding and enforced by state sanctions. The Arkansas court carefully distinguished between measures that make such binding commands and measures that merely advise or inform legislators as to the positions of the voters. Its decision is consistent with the text of Article V and the decisions of this Court and all other appellate courts (with the arguable exception of one 63-year-old state-court "advisory opinion," *see infra* p. 16) and presents no issue warranting this Court's review. Moreover, Amendment 9 has other infirmities, not yet considered because this was a pre-election proceeding, including the facial unfairness and inaccuracy of the capitalized label, that make this an inappropriate case to consider the role of popular initiatives in the amendment process.

A. The Arkansas Supreme Court's Interpretation of Amendment 9 as a Command With the Force of Law Is Correct and in Any Event Dispositive.

The Arkansas Supreme Court did not hold that Article V "leave[s] the people and the popular-initiative process . . . entirely out of the federal amendatory process." 96-919 Pet. 5.

The court held, rather, that "the people" cannot take their legislatures out of the Article V process by engraving detailed binding instructions in a state constitution. The court's decision does not prevent Arkansas voters from expressing their views on term limits, insisting that candidates state their views and disclose their voting records, and voting against candidates whose views or records do not meet their approval. *See* Pet. App. A17.

The Arkansas Supreme Court's interpretation of Amendment 9 as "binding" (Pet. App. A17) is fully justified by the text of the amendment. As the court said, "This intent is clear from the language of the proposed Amendment 9 that the legislators *are hereby instructed* to do as told." Pet. App. A17 (emphasis in original). A state legislator who violates those instructions is, on the face of it, violating the supreme law of the state and his or her oath to uphold the state constitution, Ark. Const. art. 19, § 20. The state supreme court's interpretation of that constitution is of course dispositive. *See Smiley v. Kansas*, 196 U.S. 447, 455 (1905); *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1875).[2/]

Petitioners argued in the Arkansas Supreme Court, and repeat in this Court despite the state court's ruling, that the "instructions" are actually "nonbinding" under state law because the only penalty is to have "DISREGARDED VOTER

[2/] If the initiative had called merely for an advisory expression of voter sentiment regarding CTLA, it would not have been authorized as a matter of state law under Amendment 7 to the Arkansas Constitution, under which its proponents proceeded. That Amendment provides, in pertinent part, "the people reserve to themselves the power to propose legislative measures, laws and amendments to the [state] Constitution." *See* Pet. App. A3. The initiative would not have complied with Amendment 7 unless its purpose had been to amend the written positive law of the state.

INSTRUCTIONS ON TERM LIMITS" placed next to one's name on all future election ballots. At best this is a very red herring. The instructions are stated in mandatory terms. A state legislator (or Member of Congress) who violates them is disobeying the Arkansas Constitution. Conscientious legislators do not violate specific constitutional commands, whether the penalty is heavy or light.

Moreover, the threat of being identified by the Arkansas Secretary of State as having "DISREGARDED VOTER INSTRUCTIONS ON TERM LIMITS" plainly is, as the Arkansas Supreme Court said, "extortive" rather than educational. Pet. App. A17. As that court held, the brand is "equivalent to an officially sanctioned recommendation by the State of Arkansas not to vote for such candidates because they disregarded the instructions and wishes of the voters." *Id.* Moreover, considered as a disclosure, the phrase is highly misleading: a legislator who disobeys one of Amendment 9's commands may not be ignoring voter sentiment at all. For example, a state legislator may well have OBEYED THE WISHES OF VOTERS IN HIS DISTRICT, but there is no equivalent opportunity to say so.[3/] A Member of Congress or

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[3/] In his Chambers Opinion in *Kimble v. Swackhamer*, 439 U.S. 1385 (1978), Justice Rehnquist wrote with greater precision:

> If each member of the Nevada legislature is free to obtain the views of constituents *in the legislative district which he represents*, I can see no constitutional obstacle to a nonbinding, advisory referendum of this sort.

Id. at 1388 (emphasis added). We do not mean to enter into the complex questions of where a legislator's loyalties properly lie, or the right of a state to resolve issues on a statewide referendum basis. Our only point is that the label as written is so misleading as to be obviously punitive, because a

(continued...)

state legislator who votes *for* an alternative term limits proposal (which Amendment 9 commands her to oppose) may have OBEYED THE WISHES OF VOTERS WHO ALSO SUPPORT LONGER TERM LIMITS PROPOSALS.[4] And the implication that the voters of Arkansas favor CTLA may be wholly false on some future date when the legislator acts, or in 1998 (or 2098) when the label is applied. Thus, for any number of reasons, a legislator may be branded for "DISREGARD OF VOTERS" without contravening voter wishes at all: what he or she would have violated is the command embedded in the state constitution.

B. The Arkansas Supreme Court's Interpretation of Article V Is Correct and Consistent With This Court's Decisions.

The Arkansas Supreme Court ruled that Article V does not permit a state to allow its people directly to dictate state ratification of amendments to the U.S. Constitution, or state applications for a constitutional convention, although the

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[3] (...continued)
legislator who votes against CTLA could be obeying the wishes of a majority — or even 100% — of his or her own constituents.

[4] There has been a struggle within the term limits movement as to the appropriate limits, with some proponents favoring allowing longer but still limited service. *See, e.g.*, David Hess, "Gingrich Pledges To Fight Term Limits of Less Than 12 Years," *Phila. Inquirer*, Jan. 12, 1995, at A9 (describing disagreements among advocates of six-, eight-, and twelve-year limits for U.S. Representatives). Obviously, one faction succeeded in inserting its particular view into Amendment 9. Arkansas voters were given only a yes/no choice on the whole detailed Amendment. There is no reason to assume that voters who supported Amendment 9 would have voted "no" on a different term limits proposal, or that legislators who vote "yes" on such a proposal are disregarding actual voter sentiment.

people may of course express their views on these subjects in a nonbinding fashion. This ruling was correct: Article V assigns responsibility for ratification and convention applications to state "Legislatures." The state court's distinction between a command and a nonbinding expression of voter opinion is fully consistent with the constitutional text and the pertinent cases.

Article V provides that a constitutional amendment proposed by two thirds of both Houses of Congress becomes effective "when ratified by the Legislatures of three fourths of the several States"; Article V further provides that "on the Application of the Legislatures of two thirds of the several States," Congress shall call a Convention for proposing Amendments.

As the Arkansas court noted (Pet. App. A12), this Court squarely held long ago that Article V uses the term "Legislatures" in its ordinary sense, well understood in 1787, to refer to a state's representative lawmaking body or bodies. In *Hawke v. Smith*, 253 U.S. 221 (1920), the issue was whether the Ohio General Assembly's ratification of a proposed amendment to the U.S. Constitution could be subjected to a popular referendum, as required by the Ohio constitution. The Court's answer was no. The Court held that the term "Legislatures" is to be given its plain meaning:

> The only question really for determination is: What did the framers of the Constitution mean in requiring ratification by "*Legislatures*"? That was not a term of uncertain meaning when incorporated into the Constitution. What it meant when adopted it still means for the purpose of

> interpretation. A Legislature was then the representative body which made the laws of the people. The term is often used in the Constitution with this evident meaning.

Id. at 227. The Court noted that the Framers' use of the word "Legislatures" was not casual but reflected a careful distinction between action of a representative body and direct action by the people of a state:

> The framers of the Constitution might have adopted a different method. Ratification might have been left to a vote of the people
>
> . . . .

Id. But the Framers deliberately decided against that course:

> There can be no question that the framers of the Constitution clearly understood and carefully used the terms in which that instrument referred to the action of the Legislatures of the states. When they intended that direct action by the people should be had they were no less accurate in the use of apt phraseology to carry out such purpose.

Id. at 228. The Framers wanted, as the Court noted, to assure that the function of amending the Constitution was committed to deliberative bodies. *See id.* at 226 (purpose of assigning amendment role to Congress and state legislators was to "secur[e] deliberation and consideration before any change can be proposed").

The *Hawke* Court then addressed the question whether the State was nevertheless free to allocate the ratification power to the people as a whole acting directly, as the state could with

respect to state legislative power. The Court answered that question in the negative, because the task of ratification is *not* a state legislative power, which the people of the state are free to allocate, but a task created by the Constitution itself and assigned directly to state "Legislatures":

> [R]atification by a state of a constitutional amendment is not an act of legislation . . . .
>
> . . . .
>
> It is true that the power to legislate in the enactment of the laws of a state is derived from the people of the state. But the power to ratify a proposed amendment to the federal Constitution has its source in the federal Constitution. The act of ratification by the state derives its authority from the federal Constitution to which the state and its people have alike assented.

Id. at 229-30. *See also id.* at 227 ("It is not the function of courts or legislative bodies, national or state, to alter the method which the Constitution has fixed.").

Finally, a state cannot evade Article V by having its legislature carry out the bare formalities of ratification or "Application" under the specific and legally binding command of a "direct action of the people." This follows from *Leser v. Garnett*, 258 U.S. 130 (1922), which held that the 19th Amendment had been validly adopted even though "the constitutions of several of the [ratifying] states [contained] provisions which render inoperative the alleged ratifications by their legislatures." *Id.* at 137. The Court said,

> [T]he function of a state Legislature in ratifying a proposed amendment to the

> – Federal Constitution, . . . is a federal function derived from the Federal Constitution; and it transcends any limitations sought to be imposed by the people of a state.

Id.[5] As the California Supreme Court explained in *AFL-CIO v. Eu*, 686 P.2d 609, 620 (1984), "If a state cannot constitutionally prohibit its legislature from proposing or ratifying a constitutional amendment, by implication it cannot compel the legislature to do so."

C. The Arkansas Supreme Court's Decision Does Not Conflict With Other Appellate Decisions.

In sum, the Arkansas Supreme Court ruled that Amendment 9 is invalid as "nothing more than a coercive attempt to compel the Arkansas General Assembly to do as the alleged majority of the people wish, without any intellectual debate, deliberation, or consideration of whether such action is in the best interest of all the people of this state." Pet. App. A17. It distinguished Amendment 9 from "merely a nonbinding attempt to communicate the desire of the people for term limits," *id.*, and plainly would not have invalidated the latter.

This distinction is consistent with a large number of federal and state precedents, many of which the state court examined and discussed. For example, Justice Rehnquist, in his Chambers Opinion in *Kimble v. Swackhamer*, 439 U.S. 1385

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[5] *Cf. U.S. Term Limits, Inc. v. Thornton*, — U.S. —, 115 S. Ct. 1842, 1855 (1995); *id.* at 1875 (Kennedy, J., concurring). The process of ratifying amendments to the Constitution, like the process of electing Members of Congress, is a process created and provided for by the Constitution itself.

(1978), drew the same distinction in declining to grant relief against a Nevada "advisory question to the registered voters of the State as to whether the Equal Rights Amendment should be ratified by the legislature." *Id.* at 1386. Noting that the state referendum expressly provided that "'the result of the voting on this question does not place any legal requirement on the legislature or any of its members,'" *id.*, the Justice distinguished *Hawke* and *Leser* and said "I can see no constitutional obstacle to a nonbinding, advisory referendum of this sort." *Id.* at 1388.[6/]

In *AFL-CIO v. Eu*, *supra*, the California Supreme Court drew the same distinction within a single initiative. It invalidated a portion of the initiative stating that "The People of the State of California hereby mandate that the California Legislature adopt the following [Application to Congress to call a constitutional convention to consider a balanced budget amendment]," 686 P.2d at 612, ruling that "pro forma action by a state legislature, acting under compulsion of an initiative measure, is [not] sufficient to comply with article V." *Id.* at 620. But it held that a separate portion of the initiative "which merely petitions Congress to adopt a balanced budget amendment" was valid. *Id.* at 622.

Other cases are consistent. *See, e.g., Opinion of the Justices*, 673 A.2d 693, 697 (Me. 1996) (voter initiative "directing" state legislature to apply for constitutional convention regarding term limits violates Article V); *State ex*

[6/] The Nevada Supreme Court also approved the referendum only because it was expressly advisory. *See Kimble v. Swackhamer*, 584 P.2d 161, 162-63 (Nev. 1978). The court made clear it would not have done so had the referendum been binding. "Limitations upon legislative power to ratify or refuse to ratify a proposed federal amendment likewise are in violation of Article V." *Id.* at 162 n.2.

rel. Harper v. Waltermire, 691 P.2d 826, 830 (Mont. 1984) (initiative amending state constitution to direct legislature to call for convention on balanced budget amendment and sit in perpetual session until it does is invalid; "whenever a state legislature acts to amend the United States Constitution . . . the body must be a deliberative representative assemblage acting in the absence of any external restrictions," and initiative that "attempts to direct and orchestrate" process violates Article V); *State ex rel. Tate v. Sevier*, 62 S.W.2d 895 (Mo. 1933) (invalidating bill authorizing popular conventions to pass on legislature's ratification of amendments); *Barlotti v. Lyons*, 189 P. 282 (Cal. 1920) (refusing to allow voter referendum on conclusiveness of legislature's ratification of Eighteenth Amendment); *Decher v. Vaughan*, 177 N.W. 388 (Mich. 1920) (same).

Petitioners lay great stress on one arguably contrary opinion, *In re Opinion of the Justices*, 148 So. 107 (Ala. 1933). In proposing the 21st Amendment for ratification by the states, Congress exercised its Article V power to call for ratification by state conventions rather than state legislatures. A proposed Alabama statute would have required that delegates to that state's convention pledge to follow the result of a statewide vote. The Alabama court rendered an advisory opinion that this provision would be constitutional, stating in essence that such delegates should reflect popular sentiment. This advice dealt with a situation quite different from the present case: it covered a one-time advance pledge on a yes/no question, and the pledge was part of the *ad hoc* groundrules devised for the conduct of a special state convention; it is by no means clear that the Alabama court would have given the same advice with respect to permanent commands in the state's constitution, addressed to the state legislature, applicable without regard to

any precise correspondence to voter sentiment, and enforced by a state sanction. But in any event, this unlitigated advisory opinion, which could not have been reviewed in this Court and has been distinguished by later decisions,[7] does not create a conflict that requires this Court's resolution.

D. The History of Referenda Furthering Popular Involvement in the Election of Senators Is Not Inconsistent With the Arkansas Supreme Court's Decision.

The private petitioners suggest that the Arkansas Supreme Court's ruling "is at odds with a well-established tradition of nonbinding instructions by voters to their elected officials" (96-903 Pet. 14), citing several states' turn-of-the-century efforts to encourage state legislators to follow popular recommendations when choosing United States Senators. But the Arkansas Supreme Court rejected no such principle; on the contrary, as noted above, the court recognized that nothing would bar "a mere advisory referendum or a nonbinding communication between legislators and citizens." Pet. App. A13. The court invalidated Amendment 9 because it found the amendment's instructions, backed by the sanctions of the Secretary of State, to be binding.

The historical evidence petitioners cite is inapposite. Before the 17th Amendment was adopted, various state popular initiatives sought to encourage state legislatures to exercise their Article I, Section 3 power to select candidates favored by the people. But none of these initiatives contained instructions to propose, ratify, or make "Application" with respect to the

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[7] *See, e.g., AFL-CIO v. Eu*, 686 P.2d at 705-06.

17th Amendment itself, and none presented or could have presented any question under Article V. This Court decided *Hawke v. Smith*, *supra*, in 1920, just seven years after the 17th Amendment was ratified. Far from endorsing any popular role in the formal adoption of that Amendment, the Court said, "It was never suggested, so far as we are aware, that the purpose of making the office of Senator elective by the people could be accomplished by a referendum vote." 253 U.S. at 228. Amendment 9 to the Arkansas Constitution attempts to do exactly what the states at the turn of the century never did: order state legislators to take specified actions under Article V to bring about and pass a particular proposed constitutional amendment.

E. Amendment 9's Other Infirmities Make This Case an Inappropriate Vehicle for Considering the Proper Interpretation of Article V.

Under Arkansas law, in a *pre*-election proceeding, respondents could challenge Amendment 9 only on the ground that it was not within the scope of the state's initiative procedure. State and federal constitutional challenges to the merits of the proposal itself could not be brought until after the election.[8/]

Amendment 9 has other obvious infirmities. It allows one elected official, holding partisan office, to apply a crippling label to other candidates for office. It discriminates between candidates who have had actual occasion to violate one of its

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[8/] *See Plugge v. McCuen*, 841 S.W.2d 139 (Ark. 1992). The Arkansas court's ultimate holding in the present case was that the "procedure" set forth in Amendment 9 was not "encompassed within the powers reserved to the people of this state by Amendment 7."

many rules and candidates who may oppose term limits but have not had any opportunity to confront the rules. It imposes a lifetime barrier to election, which the Secretary of State does not have any official discretion to remove even if the candidate's view and conduct or the public circumstances have changed. It purports to "instruct" Members of Congress. And for reasons made clear at pp. 9-10, *supra*, the label "DISREGARDED VOTER INSTRUCTION . . ." is hopelessly inexact, misleading, and unfair.

Such a measure is vulnerable to a wide range of challenges under the Arkansas Constitution[2/] as well as the Time, Place and Manner Clause and the First and Fourteenth Amendments to the Federal Constitution. Election regulations are supposed to prevent "voter confusion," *Munro v. Socialist Workers Party*, 479 U.S. 189, 194 (1986), not enhance it. They are supposed to be "generally applicable and evenhanded," *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983). And they are supposed to be nondiscriminatory. *See, e.g., Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989); *Tasjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986).

The very unfairness of Amendment 9 to state legislators and Members of Congress would necessarily distort the Court's consideration of the amendment's compliance with Article V. If the Court wishes to give further consideration to the proper role of state popular initiatives in bringing about the adoption of amendments to the Constitution, the Court should await a state initiative that is not so obviously vulnerable on a variety of other grounds.

2/ *See, e.g.*, Ark. Const. art. II, § 3 (equal protection); *id.* § 8 (due process); *id.* § 18 (equality of privileges and immunities).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

ELIZABETH ROBBEN MURRAY
Counsel of Record
ROBERT S. SHAFER
FRIDAY, ELDREDGE & CLARK
400 West Capitol Avenue
Suite 2000
Little Rock, AR 72201
(501) 376-2011

LOUIS R. COHEN
JONATHAN J. FRANKEL
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, DC 20037-1420
(202) 663-6000

Counsel for Respondents

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

ARKANSAS TERM LIMITS, FRANK GILBERT, AND SPENCER G. PLUMLEY,

Petitioners,

v.

EUGENIA T. DONOVAN,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Arkansas

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REPLY TO BRIEF IN OPPOSITION

A.J. KELLY
THE KELLY LAW FIRM
P.O. Box 251570
Little Rock, AR 72225
501-664-9461

EMMET T. FLOOD*
WILLIAMS & CONNOLLY
725 Twelfth Street NW
Washington, DC 20005
202-434-5000

STEPHEN J. SAFRANEK
University of Detroit-
Mercy Law School
651 E. Jefferson St.
Detroit, MI 48226
313-596-0268

**Counsel of Record*

Attorneys for Petitioners

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1. Respondent's principal answer to the petition is to say that the "Arkansas Supreme Court's Interpretation of Amendment 9 is . . . Dispositive." Br. Opp. 7. The centerpiece of that answer is this paragraph:

> The Arkansas Supreme Court's interpretation of Amendment 9 as "binding" is fully justified by the text of the Amendment. As the court said, "This intent is clear from the language of the proposed Amendment 9 that the legislators *are hereby instructed* to do as told." App. 17a (emphasis in original). A state legislator who violates those

> instructions is, on the face of it, violating the supreme law of the state and his or her oath to uphold the state constitution, Ark. Const. art. 19, § 20. The state supreme court's interpretation of that constitution is of course dispositive. [citations omitted]

Br. Opp. 8. In addition to being unreflected in the record, respondent's contentions are in error.

First, the suggestion that Amendment 9 conflicts with the oath requirement of the Arkansas constitution was not briefed below, it was not argued below and it most certainly was not resolved below — "dispositive[ly]" or otherwise. The case was argued and decided as one presenting the question of Amendment 9's constitutionality under Article V of the United States Constitution.

Second, the opinion below did not, even in passing, discuss article 19, section 20 of the Arkansas constitution (pertaining to oaths). Indeed, the opinion neither mentions nor even cites that provision. It is mystifying how the Arkansas Supreme Court can be said to have dispositively decided any issue, whether of federal or state law, on the basis of a legal provision that went altogether undiscussed.

Perhaps respondent intended to say that if *this* Court had the opportunity to address the Arkansas constitutional issue of Amendment 9's compatibility with other provisions of the Arkansas Constitution, this Court would have found Amendment 9 incompatible with some such provision. Such a contention would be unavailing for two reasons. First, the

claim was never made below and is not presented for review here.[1] Second, this Court cannot be expected to resolve the heretofore unraised Arkansas constitutional question as an alternative ground for upholding what was a patently (erroneous) Article-V based decision.[2]

Or perhaps respondent's claim is that the decision below is dispositive because it rests on some *factual* finding of "bindingness" that makes it unreviewable by this Court. But the Arkansas court's treatment of the "bindingness" of Amendment 9 was not resolved as a factual question, and respondent offers no citation for any such finding of fact.[3] Moreover, it would simply make no sense to subject ultimate

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1 *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("When issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.") This statement holds *a fortiori* for issues of state law.

2 "The process of examining state law is unsatisfactory because it requires us to interpret laws with which we are generally unfamiliar, and which often, as in this case, have not been discussed at length by the parties." *Michigan v. Long*, 463 U.S. 1032, 1039 (1983).

3 Even had it been, there would be no bar to review in this Court. The Arkansas court should not be permitted to (and did not attempt to) insulate a decision going to the heart of Article V from federal constitutional review on the basis of a doubtful finding that Amendment 9 is "factually" binding. Such a determination would call for independent appellate judicial determination of the facts upon which the constitutional claim was resolved. *See, e.g., Bose Corp. v. Consumers Union*, 466 U.S. 485, 510-11 (1984) ("The requirement of independent appellate review reiterated in *New York Times v. Sullivan* is a rule of federal constitutional law. . . . It reflects a deeply held conviction that judges — and particularly members of this Court — must exercise such review in order to preserve the precious liberties established and ordained by the Constitution.").

resolution of the Article V question presented here to the vagaries of 50 states' law of "factual" bindingness.

Or perhaps respondent's claim is that the question dispositively decided was whether Amendment 9 comports with Amendment 7 of the Arkansas constitution. Indeed, if the decision below had rested on that purely state-law ground, it would have been dispositive and posed a bar to review by this Court. But the decision below was expressly put forth (App. 3a), argued (App. 3a, 5a, 22a), understood (App. 4a), discussed (App. 9a) and decided (App. 23a)[4] as a federal question.[5]

Finally — in direct opposition to respondent's contention — a subsequent opinion of the Supreme Court of Arkansas itself describes the decision below as follows:

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[4] The Arkansas Supreme Court concluded that: "The proposed Amendment 9 is clearly violative of the provision in Article V of the United States Constitution that all amendments to the Constitution must come either from Congress or state legislatures — not from the people. It is an indirect attempt to propose an amendment to the United States Constitution, and as such, violates the narrow, specific grants of authority provided in Article V." App. 23a.

[5] To the extent the Arkansas Supreme Court decided the Arkansas law question of Amendment 9's compatibility with Amendment 7, resolution of that issue was thoroughly intertwined with the Article V question. "Our discussion . . . *necessitates* our review of the powers authorized by Article V of the United States Constitution App. 9a (emphasis added). This Court has jurisdiction over cases arising from state courts where the lower court "felt compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did." *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977); *Michigan v. Long*, 463 U.S. 1032, 1040-1041 (1983) (same).

> In [*Donovan v. Priest*], *we held that proposed Amendment 9 was violative of the amendment process provided by Article V of the Constitution* and consequently exceeded the powers reserved to the people in Amendment 7 of the Arkansas Constitution.

Schlaf v. Gilbert, 930 S.W.2d 384 (Ark. 1996) (per curiam) (emphasis added). Even the Arkansas Supreme Court disagrees with respondent.

This Court alone has the power to decide the Article V issue finally and dispositively.[6] Petitioners ask that it do so.

2. Respondent asserts that the decision below is consistent with this Court's decisions in *Hawke v. Smith,* 253 U.S. 221 (1920), and *Leser v. Garnett*, 258 U.S. 130 (1922). Mere "consistency" with prior decisions is, of course, not the issue. The Arkansas Supreme Court found that *Hawke dictated* the result reached below. But *Hawke* held only that the term "legislature" cannot, within the meaning of Article V's ratification clause, mean the people of a state acting in referendum. In *Leser* this Court held that a "state cannot evade Article V by having its legislature carry out the bare formalities of ratification or 'Application' under the specific and legally binding command of a 'direct action by the people.'" But Amendment 9 simply does not subject Arkansas legislators to a "binding command"; or relegate them to performance of "bare formalities"; or call

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[6] "State courts, in appropriate cases . . . are bound to [] interpret the United States Constitution. In so doing, they are not free from the final authority of this Court." *Arizona v. Evans*, 115 S. Ct. 1185, 1190 (1996); *see also Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821) (same).

for "direct action by the people" in the federal amendment process. Respondent's continued reliance on *Hawke* and *Leser* "is obviously misplaced." *Kimble v. Swackhamer*, 439 U.S. 1385, 1387 (1978) (Rehnquist, J., as Circuit Justice).

3. The Supreme Court of Arkansas found an express violation of Article V on the basis of Amendment 9's supposed coercive effect on Arkansas legislators. That decision created a clear split of authority with a Nevada decision finding no Article V problem when popular action "does not impose a limitation on the legislators" and leaves them "to vote for or against [an amendment] or refrain from voting [on it] at all." *Swackhamer v. Kimble*, 584 P.2d 161, 162 (Nev. 1978) (Equal Rights Amendment); and with a California decision upholding "language [that] does not purport to bind Congress or the state legislatures under Article V." *AFL-CIO v. Eu*, 686 P.2d 609, 622 (Cal. 1984) (balanced budget amendment).[7]

The decision is also in plain tension with other state court decisions that found a violation of Article V when the people of a state coerced their legislators in a way that actually impaired their freedom to exercise their Article V powers. *See State v. Waltermire*, 691 P.2d 826, 829 (Mont. 1984) (balanced budget amendment measure invalid because it "would compel the Legislature to reach a specific result

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[7] Indeed the California case, citing a Massachusetts *Opinion of the Justices*, 160 N.E. 439 (Mass. 1928) (advisory) (repeal of prohibition amendment), explicitly recognized the split on this issue, saying that "the Massachusetts and Nevada [*Swackhamer*] cases squarely disagree on the validity of a nonbinding initiative." *Eu*, 686 P.2d at 609. The Arkansas court thus joins Massachusetts and Maine, *see Opinion of the Justices*, 673 A.2d 693 (Me. 1996) (advisory), in direct opposition to Nevada, California, and Alabama, *see In re Opinion of the Justices*, 148 So. 107 (Ala. 1933) (advisory) on the question presented.

under threat of confinement and no pay"); *Eu*, 686 P.2d at 620-622 (action "directly by the people . . . would not conform to Article V" and initiative, by its terms "compel[ling] its legislators to apply for a constitutional convention," violated Article V).[8]

Reacting to this clear split of authority, respondent simply divides the cases at a different longitude. Respondent thereby succeeds only in recasting the question: Is Amendment 9 more like a nonbinding referendum (e.g., advisory plebiscite) leaving legislators free to exercise their Article V powers, or more like the kind of illicit coercion (e.g., deprivation of salary) that encroaches on legislators' Article V powers. This Court's guidance is needed to put that question to rest.

4. Respondent says that Amendment 9 is unfit for resolution by this Court because it was decided in a pre-election procedure and thus "state and federal challenges to the merits . . . could not be brought until after the election." Br. Opp. 18. This is a curious claim.

First, it was respondent who elected to bring a pre-election claim and respondent's attack, although deemed

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[8] At pages 16-17 of the brief, Respondent chides petitioners for "lay[ing] great stress" on an advisory opinion of the Alabama Supreme Court in *In re Opinion of the Justices*, 148 So. 107 (Ala. 1933). Respondent appears to have forgotten on page 16 what it had found useful on page 15, namely, the value of even advisory opinions of state supreme courts on this issue. See Br. Opp. 15 (citing *Opinion of the Justices*, 673 A.2d 693, 697 (Me. 1996)). In any event, the Alabama case represents a state court's refusal to find an Article V violation in a setting where the challenged action (requirement that representatives to a constitutional convention pledge to vote for the popular candidate) was more "coercive" than anything in Amendment 9.

"procedural" by the Arkansas Supreme Court, was in substance a direct challenge to Amendment 9 under Article V of the U.S. Constitution. Second, the pre-election posture did not stop the Arkansas Supreme Court from deciding Amendment 9's merits under the U.S. Constitution. Third, the temporal posture of the case (pre- rather than post-election) had no effect on the disposition of the Article V question below: under the Arkansas court's reasoning, the people have no power to place on the ballot an amendment encroaching on Article V and if one should pass, implementation would effect the same encroachment. The pre-election status of the Article V challenge was immaterial to the decision below and is immaterial to the issue's suitability for review by this Court.

Fourth, and as respondent well knows, if this Court should decline to review the Article V question because of its pre-election posture, petitioners will never get the opportunity to defend Amendment 9 at all. If the decision below stands, Amendment 9 will never make it on to the Arkansas ballot, it will never be voted on, it can never pass, and so can never be subject to post-election review. Respondent's "vehicle" problem is really a disguised claim for final, favorable, and summary disposition.

Respondent's further claim that Amendment 9 has other "obvious infirmities" counseling denial of the petition here is wholly speculative. No "other infirmities" were raised below and the suggestion that they exist is utterly without record support. Moreover, a reason that vitiates respondent's "pre-petition posture" argument also applies here. Denial of the petition (and concomitant dissolution of

this Court's stay of the Arkansas court's decision)[9] will ensure that these supposed "infirmities" can and will never be addressed. If the initiative can't get on the ballot, it can't get voted on. If it can't get voted on, it can't win. And if it doesn't win, the supposed "infirmities" will never be litigated. Having succeeded in state court on the Article V question — the only issue respondent chose to pursue — she now seeks to evade review of the only question actually presented on the ground that the case also presents important issues she herself chose not to assert. Petitioner respectfully asks this Court not to let respondent have her cake and eat it too.

Finally, all these hypothetical "infirmities" are immaterial to the Article V issue decided by the Arkansas Supreme Court and submitted for this Court's consideration in the petition. That Article V question is important in its own right. It has arisen in the past in connection with any number of proposed constitutional amendments. It has immediate implications for the term-limits question in the State of Arkansas and at least eight other States.[10] And, of course, its implications extend beyond the term limits question alone — to all popular efforts to spur legislators to begin the federal amendment process.

The petition presents a constitutional issue of the first importance, and it presents that issue squarely and in the

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9 *See Donovan v. Priest*, 117 S. Ct. 380 (1996) ("Should the petition for writ of certiorari be denied, this stay terminates automatically.").

10 On November 5, 1996, substantially similar term limits proposals were passed in eight other states. *See* Amicus Brief of the States of Nebraska, Colorado, South Carolina and South Dakota in Support of Petitioner, No. 96-919, *filed* January 24, 1997.

context of deep differences among state courts of last resort. Only plenary review by this Court can correct the grievous error of the court below, resolve the division in state courts, and dispositively settle this fundamental and recurring Article V question.[11] Conjectural infirmities are no bar to review.

For the reasons stated herein and previously, the petition for a writ of certiorari should be granted.

Respectfully submitted,

A.J. KELLY
THE KELLY
LAW FIRM
P.O. Box 251570
Little Rock, AR 72225

EMMET T. FLOOD*
WILLIAMS & CONNOLLY
725 Twelfth Street NW
Washington DC 20005
202-434-5000

STEPHEN J. SAFRANEK
University of Detroit-
Mercy Law School
651 E. Jefferson St.
Detroit, MI 48226

**Counsel of Record*

Attorneys for Private Petitioners

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[11] In granting the stay requested in Petitioner's Emergency Application, *see Arkansas Term Limits v. Donovan*, 117 S. Ct. 380 (1996), this court necessarily found, on the record then available, that petitioners had shown a likelihood that certiorari would be granted in this case. At the Emergency Application phase, petitioners were required to establish (1) a likelihood of irreparable injury that, assuming the correctness of the applicants' position, would result were a stay not issued; (2) a reasonable probability that the Court will grant certiorari; and (3) a fair prospect that the applicant will ultimately prevail on the merits. *See Planned Parenthood of Southeastern Pennsylvania v. Casey*, 114 S. Ct. 909, 910 (1994) (Souter, J., as Circuit Justice). Nothing in respondent's Brief in Opposition has undercut petitioner's earlier showing.